IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

IN RE THE PERSONAL RESTRAINT PETITION OF	)	NO. 44984-6-II
	)	RESPONSE TO
	)	PERSONAL RESTRAINT
CHRISTOPHER OLSEN	)	PETITION

Comes now Jon Tunheim, Prosecuting Attorney in and for Thurston County, State of Washington, by and through Carol La Verne, Deputy Prosecuting Attorney, and files its response to petitioner's personal restraint petition pursuant to RAP 16.9.

I. BASIS OF CURRENT RESTRICTIONS ON LIBERTY

Christopher Olsen is currently in the custody of the Washington Department of Corrections, serving a term of 500 months following his conviction on June 18, 2008, of felony murder in the first degree. CP 3-12, Judgment and Sentence.[1]

II. STATEMENT OF PROCEEDINGS

Olsen was tried on a First Amended Information charging him in the alternative with first degree premeditated murder and first degree felony murder. CP 17. His case and that of his co-defendant,

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1 This court has transferred the record from Olsen's direct appeal, consolidated with that of his co-defendant Michael Sublett, to this personal restraint petition.

Michael Sublett, were joined for trial. Olsen was found guilty of first degree felony murder but acquitted of first degree premeditated murder. CP 78.

Sublett was convicted of both alternative means of first degree murder, and he and Olsen appealed. Those appeals were consolidated and their convictions affirmed. State v. Sublett, 156 Wn. App. 160, 231 P.3d 231 (2010). Olsen and Sublett sought review in the Supreme Court, which was granted, and that court also affirmed the convictions. State v. Sublett, 176 Wn.2d 58, 292 P.3d 715 (2012). The mandate issued on February 12, 2013. Appendix A. Olsen now brings this timely personal restraint petition (PRP). RCW 10.73.090.

The substantive facts of the case are comprehensively summarized in both of the above-referenced appellate opinions.

III. RESPONSE TO ISSUES RAISED

A. A personal restraint petition is a collateral attack and is reviewed differently than a direct appeal.

Chapter 10.73 RCW sets out a number of procedural barriers to collateral attacks such as personal restraint petitions; courts have imposed limitations on collateral attacks purposely and for good reasons. "Personal restraint petitions are not a substitute for direct

review." In re Pers. Restraint of Dalluge, 162 Wn.2d 814, 817, 177 P.3d 675 (2008). Collateral attacks on convictions, whether based on constitutional or non-constitutional grounds, are limited, but not so limited as to prevent the consideration of serious and potentially valid claims. In re Pers. Restraint of Cook, 114 Wn.2d 802, 809, 792 P.2d 506 (1990).

To be entitled to relief in a personal restraint petition, as opposed to a direct appeal, a petitioner must meet several requirements. First, the petitioner can only obtain relief from restraint that is unlawful for the limited reasons set forth in the rules defining the procedure. RAP 16.4(c); Cook, 114 Wn.2d at 809. Second, a petitioner cannot raise grounds previously decided on the merits, either in a prior petition or on appeal, without demonstrating good cause (prior petition) or that the interests of justice require re-litigation (prior appeal). RAP 16.4(d); Cook, 114 Wn.2d at 806-7, 813 (prior petition); In re Pers. Restraint of Brown, 143 Wn.2d 431, 445, 21 P.3d 687 (2001) (prior appeal).

Although petitions raising constitutional or non-constitutional

issues not raised at trial or on appeal are no longer absolutely barred, some restrictions still apply. In re Pers. Restraint of Hews, 99 Wn.2d 80, 85-87, 660 P.2d 263 (1983). Thus a third limitation is that a petitioner claiming purported constitutional error must demonstrate actual prejudice from the error before a court will consider the merits. In re Pers. Restraint of St. Pierre, 118 Wn.2d 321, 328-30, 823 P.2d 492 (1992) (applying this threshold standard to deny relief for a constitutional error that would be per se prejudicial error on appeal). Fourth, a petitioner claiming purported non-constitutional error must "establish that the claimed error constitutes a fundamental defect which inherently results in a complete miscarriage of justice." In re Pers. Restraint of Fleming, 129 Wn.2d 529, 532-34, 919 P.2d 66 (1996) (applying this threshold standard to deny relief for an error that would require reversal on direct appeal).

Even meeting this threshold does not automatically entitle a petitioner to relief or a reference hearing, however. A personal restraint petitioner is required by the rules to provide both "a statement of ... facts upon which the claim is ... based and the evidence to support the factual allegations. RAP 16.7(a)(2)(i). A

procedural prerequisite to obtaining a reference hearing is that "the petitioner must state with particularity facts which, if proven, would entitle him (or her) to relief", "bald assertions" and "conclusory allegations" are not enough. In re Pers. Restraint of Rice, 118 Wn.2d 876, 886, 828 P.2d 1086, *cert. denied,* 506 U.S. 958 (1992). Further, "the petitioner must demonstrate that he (or she) has competent, admissible evidence to establish the facts that entitle him (or her) to relief", claims as to what other persons would say must be supported by "their affidavits or other corroborative evidence" consisting of competent and admissible evidence. Cook, 114 Wn.2d at 813-14. Both the factual basis and evidentiary support requirements are threshold procedural bars; the court must refuse to reach the merits of any petition that fails to comply. Cook, 114 Wn.2d at 814.

Finally, if a petition clears these procedural hurdles, the petitioner still must actually prove the error that makes his or her restraint unlawful by a preponderance of the evidence. St. Pierre, at 328.

> On direct appeal, the burden is on the State to establish beyond a reasonable doubt that any error of constitutional dimensions is harmless. . . . On collateral review, we shift the burden to the petitioner to establish that the error was not harmless.

In re Pers. Restraint of Hagler, 97 Wn.2d 818, 825-26, 650 P.2d 1103 (1982).

If a petitioner has had no other avenue for raising his challenges, the threshold requirements are much less. In re Pers. Restraint of Stewart, 115 Wn. App. 319, 331-32, 75 P.3d 521 (2003); In re Pers. Restraint of Cashaw, 123 Wn.2d 138, 148-49, 866 P.2d 8 (1994). Here, Olsen has had an opportunity on direct appeal to raise the issues he now brings in this PRP.

A conviction may not be collaterally attacked on a nonconstitutional ground which could have been raised on appeal but was not. State v. Wicke, 91 Wn.2d 638, 645-46, 591 P.2d 452 (1979). A petitioner may raise a claim that he is being detained in violation of the state or federal constitution. RAP 16.4(c)(2). Here, Olsen couches his challenges in terms of a denial of his constitutional right to a fair trial and to be represented by a competent attorney.

B. The closing argument of the deputy prosecutor did not infringe upon Olsen's right to a fair trial.

Olsen argues that the closing argument of the deputy prosecutor denied him the right to a fair trial guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington Constitution. He alleges that this argument constituted prosecutorial misconduct of the sort found to be reversible error in In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 286 P.3d 673 (2012).

A defendant who claims prosecutorial misconduct must first establish the misconduct, and then its prejudicial effect. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (citing to State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). "Any allegedly improper statements should be viewed within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions." Dhaliwal, 150 Wn.2d at 578. Prejudice will be found only when there is a "substantial likelihood the instances of misconduct affected the jury's verdict." Id.; State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747

(1994). A prosecutor has wide latitude in arguing inferences from the evidence. It is not misconduct to argue facts in evidence and suggest reasonable inferences from them. Unless he unmistakably expresses a personal opinion, there is no error. Spokane County v. Bates, 96 Wn. App. 893, 901, 982 P.2d 642 (1999). A prosecutor may comment on the veracity of a witness as long as he does not express a personal opinion or argue facts not in the record. State v. Smith, 104 Wn.2d 497, 510-11, 707 P.2d 1306 (1985).

A reviewing court first determines whether the challenged comments were in fact improper. If so, then the court considers whether there was a "substantial likelihood" that the jury was affected by the comments. Both the Sixth Amendment and Const. art. 1, § 22 grant defendants the right to trial by an impartial jury, but that does not include the right to an error-free trial. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). A conviction will be reversed only if improper argument prejudiced the defendant. There is no prejudice unless the outcome of the trial is affected. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

Olsen argues that during closing argument the prosecutor

showed a booking photo of Olsen which was not admitted into evidence, with the word "guilty" in red over the photo. He claims that this caused the jury to be prejudiced against him. He attaches to his petition four slides from the PowerPoint[2] presentation used by the prosecutor during closing argument. Attached to this response as Appendix B is a complete copy of that presentation, authenticated by declaration in Appendix C.

> 1. Defense counsel objected to the argument now challenged on collateral attack, and the objection was sustained. Therefore, even if the argument Olsen now complains of was error, the jury was instructed to disregard it.

Even if the slide to which Olsen objects was error, which the State does not concede, his attorney objected to it twice during the State's closing argument and the court sustained the objection.

> [PROSECUTOR] . . . And so based upon this evidence, ladies and gentlemen, we have these two individuals before you who ---
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> {DEFENSE COUNSEL] Your Honor, I'm gonna object at this time. The State is using unadmitted exhibits in this case. I'd ask that that exhibit be taken down. Thank you.
>
> [THE COURT] Thank you, counsel. I will ask you to—ladies and gentlemen of the jury, we are going to take—

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2 PowerPoint is a registered trademark of the Microsoft Corp.

> [PROSECUTOR] Well, how about if I just move along, Your Honor?
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> [THE COURT] Thank you.

Trial RP 977-78.

> [PROSECUTOR] . . . When you consider, ladies and gentlemen, the totality of the evidence of motive, of the planning, of the execution, of the burglary, the robbery, of the death of Jerry Totten—
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> [DEFENSE COUNSEL] Your Honor, I'm going to object again to unadmitted evidence in the State's closing.
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> [PROSECUTOR] When you consider the ---
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> [DEFENSE COUNSEL] Objection. I'd ask your Honor to make a ruling on that.
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> [THE COURT] I'm going to ask that we move on, that you take that picture off. Thank you counsel.
>
> [PROSECUTOR] They are guilty as indicated. These defendants, ladies and gentlemen, are guilty as charged and guilty as proven.

Trial RP 1003.

The jury was instructed that it was to consider only evidence admitted during the trial, and was to disregard any evidence ruled inadmissible. CP 47. It was further instructed that the remarks and arguments of the attorneys were not evidence. CP 48. Juries are presumed to follow instructions. State v. Kirkman, 159 Wn.2d 918,

928, 155 P.3d 125 (2007). Here the judge made it clear that the photograph was not admitted; the jury would have disregarded it, and it could not have affected the outcome of the trial.

2. The argument of the prosecutor in Olsen's case was not error, but even if it were Olsen cannot demonstrate prejudice.

The prosecutor, during closing argument, illustrated his remarks by using a PowerPoint presentation. A copy of all of the slides prepared by the prosecutor for closing argument is contained in Appendix B. Olsen asserts that this presentation is virtually identical to a presentation found to constitute prosecutorial misconduct in Glasmann. That is not the case, and the closing argument in Olsen's trial was not prosecutorial misconduct.

In the closing argument in Glasmann, the prosecutor used a PowerPoint slide presentation in which he incorporated various forms of media: video from security cameras, audio recordings, photographs of the victim's injuries, and Glasmann's booking photograph, which had been admitted into evidence. Id. at 701. The photograph showed "extensive facial bruising." Id. at 700. It was "digitally altered to look more like a wanted poster than properly admitted evidence." Id. at

715, J. Chambers concurring. Five slides used during the prosecutor's closing showed the booking photograph; one included the caption "DO YOU BELIEVE HIM?"; one was captioned "WHY SHOULD YOU BELIEVE ANYTHING HE SAYS ABOUT THE ASSAULT?" Id. at 701-02, 706. One of the slides showed a photograph, presumably taken from the security video, of Glasmann holding the victim in a choke hold while crouched behind the counter of a minimart, with the captions "YOU JUST BROKE OUR LOVE". Id. at 701. Another showed the victim's injuries with two captions: "What was happening right before the defendant drove over Angel . . . ", and ". . . you were beating the crap out of me!" Id. Finally, three slides during closing arguments successively superimposed the word "GUILTY" over Glasmann's photograph, forming a "GUILTY GUILTY GUILTY" over his bruised and bloodied face at the end. Id. at 712. Glasmann did not object to any of these slides. Id. at 702. In closing the prosecutor told the jury that to reach a verdict it must decide "Did the defendant tell the truth when he testified?" and that the jury had a duty to compare the testimony of the State's witnesses to that of the defendant. Id. at 701.

The jury found Glasmann guilty of first degree kidnapping and obstruction, and the lesser included offenses of second degree assault and attempted second degree robbery. Id. at 703. The Court granted review to consider whether the prosecutor's presentation and closing arguments precluded Glasman from a fair trial and whether or not his counsel was ineffective. Id. at 703. In a plurality decision in which the concurrence differed from the lead only in emphasis, the Court determined that the prosecutor engaged in multiple instances of error and that this error, in its totality, had incurably prejudiced the jury. Id. at 714.

First, by making "repeated assertions of the defendant's guilt" visually through slides, the prosecutor had used his position as representative of the State to express his opinion regarding Glasmann's guilt:

> A prosecutor could never shout in closing argument that "Glasmann is guilty, guilty, guilty!" and it would be highly prejudicial to do so. Doing this visually through use of slides... is even more prejudicial.

Id. at 710, 708. Second, by superimposing inflammatory commentary on already prejudicial photographs, the prosecutor had altered evidence. Id. at 706. He had "produced a media event with the

deliberate goal of influencing the jury to return guilty verdicts on the counts against Glasmann." Id. at 707. Third, by "...insinuating that the jury could only acquit... if it believed Glasmann...," the prosecutor had subtly shifted the State's burden to the defendant. Id. at 710, 713-714.

The Court concluded that, in consideration of "*...the entire record and circumstances of this case*," there was a substantial likelihood that the multiple instances of error, in their totality and cumulative effect, had affected the jury's verdict. Id. at 714-715 (emphasis added). The prosecutor's use of "highly inflammatory images unrelated to any specific count..." had pervaded the entire proceeding and appealed to the jury's passion and prejudice; the jury was vulnerable to being unduly influenced by the prosecutor's personal opinion; and the prosecutor's misrepresentation of Glasmann's burden had 'shift[ed] the requirement that the State prove the defendant's guilt beyond a reasonable doubt." Id. at 712, 706, 709, 713. The danger of pervasive misconduct was "especially serious" because of the "nuanced distinctions" between crimes that were at issue at trial. Id. at 710.

The only similarity between the closing argument in Glasmann and that in Olsen's case is the use of the word "guilty" in red over a picture of the two defendants, a copy of which Olsen attaches to his petition and which is included as the last page of Appendix B to this response. Olsen asserts that the photograph used by the prosecutor was a booking photo; that is not apparent from the photograph itself, nothing in the record reflects that, and Olsen does not include that assertion in his sworn declaration. It is a very tight shot of nothing more than Olsen's head and neck with a blank background. Nothing about the picture itself is even remotely prejudicial to Olsen. The State does not dispute that the photo itself may not have been admitted as an exhibit, but it was a neutral depiction of Olsen, who had been sitting before the jury for several days. There was no claim that the person in the photo was not Olsen. It was not used as evidence, nor claimed to have been evidence, but was used for illustrative purposes only. It was not "digitally altered" to look like a wanted poster.

a. Unlike in Glasmann, the prosecutor's slide with the word 'guilty' over Olsen's photograph did not express the prosecutor's opinion.

A prosecutor is expected to act in a manner worthy of his office; he has a duty to advocate the State's case against an individual. State v. James, 104 Wn. App. 25, 34, 15 P.3d 1041 (2000); State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994). While he cannot use his position as a platform to express his own opinion, a prosecutor has wide latitude in arguing from the evidence. Dhaliwal, 150 Wn.2d at 576-578 (quoting State v. Smith, 71 Wn.2d 497, 510, 707 P.2d 1306 (1985)). It is not misconduct to argue facts from the evidence and suggest reasonable inferences from them. State v. McKenzie, 157 Wn.2d 44, 53, 134 P.3d 221 (2006). To determine if the prosecutor is exceeding his bounds and expressing his personal opinion independent of the evidence, the challenged comments or event must be viewed in context:

> It is not uncommon for statements to be made in final arguments which, standing alone, sound like an expression of personal opinion. However, when judged in the light of the total argument, the issues in the case, the evidence discussed during the argument, and the court's instructions, it is usually apparent that counsel is trying to convince the jury of certain ultimate facts and conclusions to be drawn from the evidence. Prejudicial error does not occur until such time as it is clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion.

McKenzie, 157 Wn.2d at 54, (quoting State v. Papadopoulos, 34 Wn. App. 397, 400, 662 P.2d 59 (1983)).

Here, the prosecutor's final slide did not express the prosecutor's opinion, nor was it prejudicial. First, unlike the photograph used in Glasmann, the photo of Olsen used at the end of trial was not itself prejudicial; it neither showed Olsen in handcuffs nor in a state of bloody injury to suggest his guilt. Appendix B at 47. Second, viewing it as presented, it becomes apparent that the prosecutor's final slide was a walk-through of the State's evidence against Olsen with the word 'guilty' over his photograph to illustrate the State's requested conclusion.[3] Appendix B. The prosecutor's final PowerPoint is actually a series of slides, starting with a photo of Olsen and Sublett surrounded by a neutral background. Appendix B at 38. As the prosecutor concluded his closing argument, Trial RP at 1003, he began to list the specific areas of evidence he asked the jury to consider.

> When you consider, ladies and gentlemen, the totality of the evidence of motive, of the planning, of the

3 The slide that Olsen submits to this Court, though accurate, is incomplete. He submits only the final image of the prosecutor's final slide. Attached are copies of each sequence of the final slide as it was presented to the jury. Appendix B, 38-47..

execution, of the burglary, the robbery, of the death of Jerry Totten—

Trial RP at 1003.

A new slide was introduced for each type of evidence in sequence, putting the words in the space around the photographs: "motive", Appendix B at 39; "planning", Appendix B at 40; "execution", Appendix B at 41; "burglary", Appendix B at 42; "robbery", Appendix B at 43; "death", Appendix B at 44; "deception", Appendix B at 45; "flight", Appendix B at 46; and, finally, the last slide containing all of the areas of evidence and with the word guilty in red over the faces of the two defendants. Appendix B at 47.[4]

The prosecutor's placement of the word 'guilty' over Olsen's photograph was not an emotional appeal or a flagrant allegation that the defendant was "GUILTY, GUILTY, GUILTY" "unrelated to any specific count" as in Glasmann, but the conclusion to the State's review and a request that the jury return a verdict of guilty. Glasmann, 175 Wn.2d at 712. The prosecutor did not "visual[ly] 'shout[],'" but asked the jury to consider all the evidence and return a

4 It is unclear if the prosecutor showed all of the slides in the sequence. It seems likely that, because Olsen's counsel objected, the sequence was aborted at the word "death." Trial RP at 1003. Presumably the final slide, Appendix B at 47 was displayed or Olsen would not have been aware of it.

guilty verdict. Id. at 709. It's also unclear how the use of a large screen, a visual aid available to both the prosecution and the defense, or the fact that it faced the jury, were prejudicial. Memorandum in Support of Petition at 2. One would expect that the screen would be facing the audience to whom the argument was directed. The prosecutor's slide did not express the prosecutor's opinion as in Glasmann.

Olsen quotes the prosecutor as saying "What is the saying? A picture says a thousand words," in an attempt to make the final slide more effective to the jury. Olsen takes this quote entirely out of context. What the prosecutor said was:

> . . . [H]ere we have Mr. Sublett in Boise. Really messed up? What is that saying, a picture says a thousand words? Here we have got a man, here we have got a killer, who is literally and figuratively in the driver's seat, ladies and gentlemen. He might say to his friend "I'm messed up," but he's got Jerry Totten's credit cards. He's tapped into his line of credit, as far as we know, he's been tapping into about $50,000.

Trial RP at 1001.

The prosecutor had been using the PowerPoint slides to illustrate his argument, and comparing the transcript of the argument, beginning at page 976 of the trial transcript and ending at page 1003,

with pages one through 37 of Appendix B, the two correlate very closely.[5] At the time the prosecutor made the remarks quoted above, he would have been displaying the slide at page 36 of Appendix B. This appears to be a photo taken from some type of security camera, and is clearly Sublett, not Olsen, sitting in the driver's seat of a vehicle. The prosecutor was talking about Sublett, not Olsen. His remarks had nothing to do with the final slide in the presentation, was not an attempt to inflame the jury, and would not have been prejudicial to Olsen in any way.

b. Unlike in Glasmann, the prosecutor did not alter evidence.

In Glasmann, the Court found that the prosecutor had intentionally altered evidence when he "presented the jury with copies of Glasmann's booking photograph altered by the addition of phrases calculated to influence the jury's assessment of Glasmann's guilt and veracity." Glasmann, 175 Wn.2d at 705-706. A perusal through the slides used by the prosecutor in Olsen's case reveals a slideshow and

5 It is unknown if all of these slides were displayed to the jury. They were available to the prosecutor in the courtroom. It is not apparent that the slides on pages 4 trough 8 of Appendix B were shown.

trial of a different character. Appendix B. The slides include the procedural posture of the case, the definition of the crime charged and other definitions, reminders about what the jury is allowed to consider, explanations of the distinction between direct and circumstantial evidence, photos from the crime scene with arrows pointing to specific places and items with explanatory captions such as " explanations of legal principles, maps, and overview shots with arrows and pointers. Appendix B. The only evidence that Olsen holds out as 'altered' or impermissibly submitted is the final slide, placed on a large screen, in which the world 'guilty' is placed over photographs of the two defendants. .

Olsen misunderstands what constitutes 'altered' evidence, however. The Court in Glasmann did not hold that mere use of captions on PowerPoint slides was alteration, but rather that the "addition of phrases calculated to influence the jury's assessment of [the defendant's] guilt and veracity" constituted alteration. Glasmann, 175 Wn.2d at 705. An overview of the slides used by the prosecution in Olsen's trial reveals not a "persuasive visual kaleidoscope experience" to "dazzle, confuse, or obfuscate the truth," but a

conservative attempt to guide the jury through the law and the facts to help it make an informed decision. Glasmann, 175 Wn.2d at 715, J. Chambers concurring. There were no slides in the prosecutor's presentation with the kind of ill intentioned commentary or inappropriate challenges that the Court found prejudicial in Glasmann. The prosecution at Olsen's trial did not alter evidence as in Glasmann.

c. Unlike in Glasmann, the prosecutor did not make any improper arguments.

Unlike in Glasmann, Olsen alleges only one error in the prosecutor's statements during closing arguments, the remark about a picture saying a thousand words addressed in the previous section. There was nothing improper in the rebuttal portion of the argument, nor does Olsen claim that there was.

d. Even if there was error, unlike in Glasmann there was no cumulative prejudicial effect.

Olsen argues that a single "guilty" on a photograph constitutes prosecutorial misconduct warranting a new trial; this was not the Court's holding in Glasmann. The Court in Glasmann addressed repetitive conduct—the prosecutor's expression of his own opinion of

the defendant's guilt, commentary and demeaning phrases on photos presented as evidence, and statements to the jury shifting the State's burden. Glasmann, 175 Wn.2d at 682-683. The Court found that this conduct, "when viewed as a whole," was "so pervasive" that it had 'contaminated' the entire proceeding and deprived Glasmann of his right to a fair trial. Id. at 710. The danger of cumulative prejudice was "especially serious" because Glasmann's defense involved "nuanced distinctions" between degrees of crimes. Id. Here, the jury was not required to distinguish between gradations of intent, but only whether Olsen had committed one or both alternatives of first degree murder. The prosecutor neither expressed his opinion, presented altered evidence, or made impermissible arguments. Even if the prosecutor's use of the word 'guilty' over Olsen's photo was error, that error was not component to a pattern. If it was an error, it was not so inflammatory as to cause a jury to disregard the evidence, ignore the instructions, and abandon its common sense to convict Olsen if it felt the State had not met its burden of proof. The jury did, in fact, acquit Olsen of premeditated murder, which is some indication it was not swept away on a tide of irrational emotion.

The differences between Olsen's and Glasmann's cases are many, their trials' basic characters distinct. The court in Glasmann found that no instruction could have neutralized the cumulative effect of the prosecutor's expression of his own opinion, the improper slides, and the statements the prosecutor made during closing argument. Glasmann, 175 Wn.2d at 707. The prosecutor in this case made no error when he employed a PowerPoint slide to guide the jury through the evidence and used the word 'guilty' to illustrate the State's request that the jury return a verdict of guilty. Olsen's counsel objected and was sustained. Even if this was error, it was so isolated that it could not have interfered with Knapp's right to a fair trial.

C. Olsen has produced no evidence that a juror committed misconduct, that it was ineffective assistance of counsel to fail to challenge the juror, or that he was prejudiced by that juror sitting on the jury.

Olsen maintains that he had had contact with one of the jurors because the juror, prior to trial, had apparently conducted or assisted with church services in the jail and, Olsen says, prayed with him about his case. He claims he informed his attorney of this during voir dire. Petition, Ground II at 2; Olsen's declaration, paragraphs 17 and 18.[6] Well into the trial, before the trial began for the day on June 16, 2008,

the bailiff informed the court and counsel that one of the jurors advised her that he had been to one of the jail church services but had not seen Olsen there. The court did not find that significant and neither defense counsel nor the prosecutor asked to inquire further. Trial RP 850-851. Olsen now claims ineffective assistance of counsel because his attorney did not pursue the matter.

A petitioner must provide evidence to support factual allegations. RAP 16.7(a)(2)(i). Here Olsen has produced nothing but his self-serving statements in his petition and sworn declaration. He provides no declaration from his trial counsel or anyone who could say whether or not that juror actually was present at a church service attended by Olsen. He produces nothing but sheer speculation that the juror had knowledge of him and his case but lied about it for some unknown reason.

Olsen offers no explanation why the juror, if he indeed lied during voir dire about not knowing Olsen, would come forward after several days of trial and inform the court that he had attended a church service in the jail. It is more likely that Olsen mistook the juror for someone else, or, if this juror was at the same service Olsen

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6 Olsen's memorandum on Ground II ends in mid-sentence on page 2.

attended, that he simply did not remember Olsen.

Olsen is claiming ineffective assistance of counsel, an issue that will be more fully addressed below, but in this particular instance he has not offered any evidence that counsel made an error or that he was prejudiced by it. A petitioner claiming constitutional error must demonstrate actual prejudice before a reviewing court will consider the merits of the claim, Pierre, 118 Wn.2d at 328-30, and Olsen has nothing to show that if this juror had been challenged, the outcome of his trial would have been any different.

> D. Olsen did not receive ineffective assistance of counsel for failure to request a jury instruction regarding voluntary intoxication. His argument amounts to a claim that his attorney chose the wrong strategy, which cannot form the basis for a claim of ineffective assistance of counsel.

To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot

rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). For example, "[o]nly in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." State v. Neidigh, 78 Wn. App. 71, 77, 895 P.2d 423 (1995) (internal quotation omitted).

While it is easy in retrospect to find fault with tactics and strategies that failed to gain acquittal, the failure of what initially appeared to be a valid approach does not render the action of trial counsel reversible error. State v. Renfro, 96 Wn.2d 902, 090, 639 P.2d 737 (1982). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995).

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption

> that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Strickland, 466 U.S. at 694-95.

The test for whether a criminal defendant was denied effective assistance of counsel is if, after considering the entire record, it can be said that the accused was afforded effective representation and a fair and impartial trial. State v. Thomas, 71 Wn.2d 470, 471, 429 P.2d 231 (1967); State v. Bradbury, 38 Wn. App. 367, 370, 685 P.2d 623 (1984). Thus, "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation", but rather to ensure defense counsel functions in a manner "as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 688-689; *See* Powell v. Alabama, 287 U.S. 45, 68-69, 53 S. Ct. 55, 77 L. Ed. 158 (1932). This does not mean, then, that the defendant is guaranteed *successful* assistance of counsel, but rather one which "make[s] the adversarial testing process work in the particular case." Strickland, 466 U.S. at 690; State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978); State v. White, 81 Wn.2d 223,

225, 500 P.2d 1242 (1972).

Prejudice occurs when but for the deficient performance, the outcome would have been different. In re Personal Restraint Petition of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996).

> It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.

Strickland, 466 U.S. at 693 (internal quotation omitted). Thus, the focus must be on whether the verdict is a reliable result of the adversarial process, not merely on the existence of error by defense counsel. Id. at 696. A reviewing court is not required to address both prongs of the test if the appellant makes an insufficient showing on one prong. State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1989). "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . [then] that course should be followed [first]." Strickland, 466 U.S. at 697.

Olsen argues that the evidence of his extensive drug use,

admitted during the trial, proved he was so intoxicated he could not have formed "the mental state required to establish the crimes charged." Petition, Ground III at 1. The crime charged was murder. He faults his attorney for failing to research the effects of methamphetamine, offer more extensive evidence of Olsen's intoxication, obtain expert testimony, and seek a jury instruction for voluntary intoxication. That instruction, WPIC 18.10, reads as follows:

> No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant [acted] [or] [failed to act] with (fill in requisite mental state).

This instruction mirrors the language of RCW 9A.16.090.

A defendant is entitled to a voluntary intoxication instruction when "(1) the crime charged has as an element a particular mental state, (2) there is substantial evidence of drinking, and (3) the defendant presents evidence that the drinking affected his or her ability to acquire the required mental state." State v. Gallegos, 65 Wn. App. 230, 238, 828 P.2d 37 (1992). Olsen was acquitted of premeditated first degree murder, and he thus argues that his methamphetamine use would have impaired his ability to form the

intent to commit first degree burglary or either first or second degree robbery, the felonies forming the bases of the felony murder allegation. CP 64-70. The mental state for burglary is intent to commit a crime, CP 66, and for robbery the intent to commit theft. CP 69.

At trial, Olsen testified about his extensive use of methamphetamine, describing the effects of the drug as excitement (sometimes), accelerated thoughts and actions, the ability to go for days without sleep, and doing things one wouldn't necessarily do if sober—"to a point." Trial RP 863. It did not cause him to black out, maybe affected his memory "a little bit," and it "could be said" that it affected his perception of events. Trial RP 863. He admitted to using meth "pretty much" during the time between his release from jail and the murder. Trial RP 865. Following his release, Frazier and Sublett took him to their hotel room, and when they left some time later Olsen remained in the room because he was high and had a headache. Trial RP 881-82. He said he was high for several weeks after being bailed out of jail, Trial RP 911, including his time at the victim's house when the body was moved. Trial RP 915. April Frazier

also testified that the three of them drank alcohol and used meth. Trial RP 521, 649,

Olsen did not ever say, however, that he was too intoxicated to understand what he was doing, nor did he produce any evidence that would lead to that conclusion. During the testimony cited above, he minimized his impairment from drugs. Rather, he steadfastly maintained that he was not present at the time the killing occurred and that his participation in the later burglary and disposition of the body occurred under duress.

Several weeks after the murder, Olympia police officers located Olsen. Trial RP 788. He told the police that he had remained at the hotel while Frazier and Sublett left, because he had been drinking and "the dope was affecting him." Trial RP 796. He denied having any part in the killing. RP 800. He told the officers that he was told to help move the body, although at first he did not realize that is what was being taken out of the house. When he did, he pretended to help, and when the three left to dispose of the body, he did not at first realize what they were going to do. Trial RP 802-03. He said he was trying to leave items that Frazier and Sublett might have touched in

locations where the police might find them if he (Olsen) called the police. Trial RP 805-06. Olsen said he was very frightened of Frazier and Sublett, and that Sublett had pulled a gun and told him, "You're working for me. I bailed you out. You're working for me now." Trial RP 809. Finally, he told the police that in retrospect he wondered if the victim had still been alive when Olsen was there, and if he could have done something to alter the outcome. Trial RP 822.

Olsen testified at trial. He said that Sublett had taken him for a ride in his car, pulled a gun, and told him to cooperate or else.[7] Trial RP 854. He denied being present when the victim was killed. Trial RP 895. His only involvement was to help move the body into the back of a pickup, and then he only put his hand on the table on which the victim was lying. Trial RP 896, 915. He went back to the victim's house several times with the other two to go through the property, but he had no choice. Trial RP 905. He moved about the house trying to look busy without really doing anything, "trying to survive and stay safe." Trial RP 914.

In closing argument, Olsen's counsel concentrated on attacking Frazier's credibility, *e.g.*, Trial RP 1031, 1036, 1044-45, 1047, 1053-

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7 Frazier also testified that Sublett had pointed a gun at Olsen. Trial RP 629,

54. He argued that the murder occurred earlier than the State claimed, at a time when Olsen was still in jail. Trial RP 1034-35, 1037-39, 1043, 1068. Counsel argued that Olsen incurred no accomplice liability for crimes committed by the other two. Trial RP 1054-56, 1063, 1065-66.

To be entitled to the defense of voluntary intoxication, there must be evidence that connects the defendant's intoxication to the claimed inability to form intent. State v. Guilliot, 106 Wn. App. 355, 366, 22 P.3d 1266 (2001) (specifically addressing the admissibility of expert testimony regarding intoxication). Olsen produced no evidence at all that his meth intoxication made him unable to form the intent to commit burglary or robbery. To the contrary, he claimed to have been thinking quite clearly; he pretended to help move the body and search for valuables to avoid the wrath of Sublett and Frazier, he purposely moved objects carrying the fingerprints of the others in places where the police would easily find them, and everything he did was because he was frightened of Sublett and Frazier. There was no basis for a voluntary intoxication instruction or for trial counsel to have sought expert testimony.

642.

Attached to his Petition, Olsen offers several pages of information about meth which he has gleaned from the internet. These are articles about the catastrophic effects of methamphetamine use. The State does not dispute that meth causes horrible and permanent damage to users. However, nowhere in the research outlined in these articles does it say that a person intoxicated on meth is incapable of forming intent. On the second page of that material it says that meth can "alter judgment and inhibition and lead people to engage in unsafe behaviors," in that instance specifically addressing the transmission of the HIV virus and hepatitis. The State does not argue that Olsen's meth use did not affect his judgment. But bad judgment is not the same as inability to form intent. Olsen simply gave his counsel nothing to work with to build a defense around involuntary intoxication. He did offer, and was permitted, an instruction on the defense of duress. CP 74. The jury was also instructed that it was a defense if he did not commit the murder or participate in it in any way, had no reasonable grounds to believe another participant was armed, and had no reason to believe any other person intended to cause the death or serious physical injury.

CP 75. Those instructions were supported by Olsen's evidence.

Given the statements Olsen made to the police and his testimony at trial, it would have been very risky for trial counsel to also offer the involuntary intoxication defense. A jury is unlikely to find credible a defense that says, "I wasn't there, I didn't have any part in the killing, and the things I did do I did under duress, but at the same time I was too intoxicated to form the intent to commit a crime." Counsel made a reasonable choice of strategies, choosing the only one that made any sense given Olsen's statements. If Olsen is arguing that his attorney chose the wrong strategy, he cannot carry his burden of showing ineffective performance. Tactical decisions cannot form the basis of a claim of ineffective assistance of counsel. Hendrickson, 129 Wn.2d at 77-78.

For all of the above reasons, trial counsel was not ineffective for failing to obtain expert testimony about the effects of meth as Olsen argues in Ground IV of his petition. In his argument, Olsen simply equates meth intoxication with an inability to form intent. He does not produce evidence that he in fact lacked that ability. As noted above, bad judgment does not equal inability to form intent, nor does

skewed perception. For expert testimony to be admissible on the issue of voluntary intoxication (or diminished capacity), "'the evidence must reasonably and logically connect the defendant's intoxication with the asserted inability to form the required level of culpability to commit the crime charged.'" Guillot, 106 Wn. App. at 366 (quoting State v. Gabryschak, 83 Wn. App. 249, 252-53, 921 P.2d 549 (1996)).

Olsen cites to Jennings v. Woodford, 290 F.3d 1006 (9th Cir. 2001) for the proposition that his counsel had a duty to investigate his drug use and its implications. Petition, Ground IV at 4. He argues that there is no indication that his counsel did do such an investigation, Id., but he has the burden of showing that counsel did not do so. It is true that under certain circumstances, a failure to investigate may constitute deficient performance "in either the guilt or the penalty phase of a capital case." Jennings, 290 F.3d at 1013. This was not a capital case. Further, defense counsel was aware, based on the record, that Olsen was a chronic drug user.

In Jennings, where the trial counsel was found to be deficient, counsel had failed to investigate a diminished capacity defense even

though he was aware that Jennings was a long-term meth addict and had used the drug on the night of the murder, had attempted suicide, had been diagnosed as schizophrenic, had a history of injuring himself intentionally and then pouring liquids into the wounds, which resulted in gangrene, had been involuntarily committed for psychiatric evaluation, and that friends, coworkers, and counsel's own paralegal thought there was something "seriously wrong" with Jennings. Jennings, 290 F.3d at 1015. Olsen does not offer any evidence except that he was a chronic meth user. Even if his trial counsel did not investigate a voluntary intoxication defense, there is scant evidence that he should have done so.

Olsen has not shown deficient performance by his trial counsel, nor has he offered any evidence that had his attorney argued voluntary intoxication the outcome of the trial would have been different, and thus he has failed to show prejudice. Nor has he made the requisite showing to obtain a reference hearing, which he requests. Petition, Ground III at 6.

RAP 16.12 provides for reference hearings. An appellate court does not determine questions of fact. State v. Davis, 25 Wn. App.

134, 137, 605 P.2d 359 (1980). "If a personal restraint petitioner presents a prima facie case of error, but the issues cannot be resolved on the existing record, the case will be transferred to superior court for a reference hearing." In re the Pers. Restraint of Cadwallader, 155 Wn.2d 867, 879, 123 P.3d 456 (2005). Here the existing record contains sufficient facts for this court to determine that counsel was not ineffective for failing to pursue an involuntary intoxication defense.

D. Trial counsel was not ineffective for inquiring about Olsen's possession of a gun. It was not that question but Olsen's answer to a question on cross-examination that opened the door to admission of his conviction for second degree unlawful possession of a firearm.

During trial, the State played recordings of two telephone calls Olsen made from the jail on January 28 and 29, 2007. Trial RP 788. Transcripts of those calls were admitted as Exhibits 178A and 178B. In the first of the two calls, between Olsen and Frazier, Olsen spoke about possessing a "hand cannon. . . .[a]nything you aim at, or if you get within ten feet of it, it's done. Toasty." Exhibit 178A at 10. Just before that he had said, "If I'd a done something to that boy that night, I'd a blown that mother f******'s brains out all over that motel room."

Id at 9.

On direct examination, defense counsel asked Olsen what kind of gun he referred to, and Olsen explained that it was a 25-millimeter flare gun from Boater's World. Trial RP 856. On cross examination, the prosecutor asked him about the gun and he repeated that it was a flare gun. Trial RP 875. On redirect, Olsen explained that "toasty" meant that a hot ball of fire comes out of the barrel of a flare gun. Trial RP 916. On recross, Olsen said that he would not use a gun. Trial RP 919. The prosecutor asked if he had ever had a gun; Olsen's counsel objected, and after initially sustaining the objection the court excused the jury and heard argument. The court found that "[t]hat answer opens the door. I know you're objecting, but I believe he has placed in that he would never use a gun." The court permitted the State to ask about a 2006 conviction for second degree unlawful possession of a firearm. Trial RP 919-22.

Given the statements Olsen made in the phone call, his attorney had no choice but to do damage control. Owning a flare gun and talking tough to impress somebody from whom one wants a favor is much less incriminating than the picture that would be left in the

minds of the jurors after hearing the recorded phone call. And it was not that question which opened the door to the admission of the conviction for unlawful possession of a firearm. It was Olsen's statement that he would never use a gun. Blame cannot be laid on his attorney for a response he made to the prosecutor on cross-examination.

Olsen claims that if his attorney had not asked about the gun the prosecutor would not have asked the cross-examination question that resulted in the conviction being admitted. Petition, Ground V at 1. However, just before Olsen made that statement that he would never use a gun, he testified that he believed Sublett was a member of a California gang called the Insane Boys. The prosecutor then asked if he would be less fearful if he had a gun, whereupon Olsen said he would never use a gun. Defense counsel's question about the gun did not open the door to admission of the conviction. It was Olsen's statements during the recorded telephone conversation, coupled with his answers to cross examination questions, that opened the door.

Even if trial counsel had asked questions which gave the State the opportunity to inquire about the unlawful possession of a firearm

conviction, it was still necessary for him to mitigate the damage resulting from the phone conversation. No competent attorney would leave the jury wondering about what sort of weapon Olsen possessed that would blow a person's brains all over a motel room. The explanation about a flare gun and baseless boasting was much preferable from a defense perspective. There was no deficient performance by defense counsel.

Regarding the prejudice prong of the test for ineffective assistance of counsel, Olsen argues that the conviction was inherently prejudicial because he was a witness and it shifted the focus of the jury from the merits of the charge to his general propensity to commit crime. Petition, Ground V at 2. He cites to State v. Jones, 101 Wn.2d 113, 677 P.2d 131 (1984), to support his argument. Jones, however, was overruled by State v. Brown, 113 Wn.2d 520, 782 P.2d 1013 (1989). Erroneous rulings regarding prior convictions (ER 609) are subject to a harmless error analysis and will be reversed only if, "within reasonable probabilities" the outcome of the trial would have been "materially affected." Id. at 554. Olsen has not offered any evidence that without knowledge of his conviction for unlawful

possession of a firearm it would have acquitted him of felony murder. Given his admission to prodigious use of unlawful substances and extensive testimony about the fact that he was in jail when he contacted Frazier, it seems unlikely that conviction carried a huge amount of weight with the jury.

Finally, this is a PRP, not an appeal. Prejudice is not presumed in a PRP—the petitioner has the burden of proving either actual prejudice (for constitutional errors) or a complete miscarriage of justice (for nonconstitutional errors). He has not done so.

E. There was no cumulative error.

The cumulative error doctrine "is limited to instances where there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial." State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

The cumulative error doctrine does not apply where there are few errors which have little, if any, effect on the result of the trial. State v. Lindsay, 171 Wn. App. 808, 838, 288 P.3d 641 (2012).

As argued above, only the final PowerPoint slide in the prosecutor's closing argument could even be considered error, and

then only by stretching the holding of Glasmann beyond what that court actually said. There was no cumulative error.

IV. CONCLUSION

Based upon the foregoing arguments and authorities, the State respectfully asks this court to deny and dismiss this PRP.

RESPECTFULLY SUBMITTED this 20th day of August, 2013.

JON TUNHEIM
Prosecuting Attorney

Carol La Verne

CAROL LA VERNE, WSBA#19229
Deputy Prosecuting Attorney

APPENDIX A

122

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL LYNN SUBLETT,

Petitioner.

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER LEE OLSEN,

Petitioner.

MANDATE

NO. 84856-4

C/A No. 38034-0-II & 38104-4-II

Thurston County Superior Court
No. 07-1-00312-0
&
Thurston County Superior Court
No. 07-1-01363-0

THE STATE OF WASHINGTON TO: The Superior Court of the State of Washington in and for Thurston County.

The opinion of the Supreme Court of the State of Washington was filed on November 21, 2012. The opinion became final on February 8, 2013, upon entry of the order denying motions for reconsideration. This cause is mandated to the superior court from which the appeal was

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ed 14

taken for further proceedings in accordance with the attached true copy of the opinion and the order denying motion for reconsideration.

Pursuant to Rule of Appellate Procedure 14.6 (c) and "CLERK'S RULING ON COSTS", entered on December 27, 2012, costs are taxed as follows: Costs in the amount of $8,384.90, are taxed in favor of Respondent, Washington State Office of Public Defense, and against Petitioners, Michael Lynn Sublett and Christopher Lee Olsen, who shall be jointly and severally liable for payment of the same.

I have affixed the seal of the Supreme Court of the State of Washington and filed this Mandate this 12th day of February, 2013.

Ronald R. Carpenter
Clerk of the Supreme Court
State of Washington

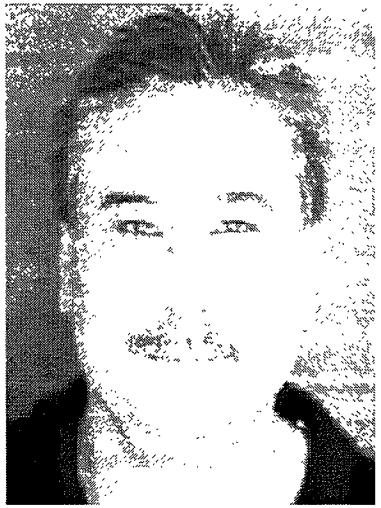
cc: Hon. Christine A. Pomeroy, Judge
Hon. Betty Gould, Clerk
Thurston County Superior Court
Jodi R. Backlund
Manek R. Mistry
Jeffrey Erwin Ellis
Carol L. La Verne
Reporter of Decisions

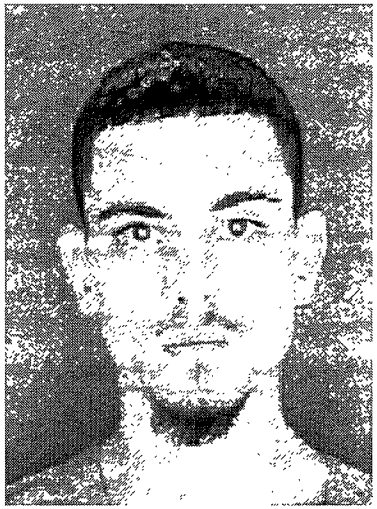
APPENDIX B

STATE OF WASHINGTON

vs.

MICHAEL SUBLETT AND CHRISTOPHER OLSEN



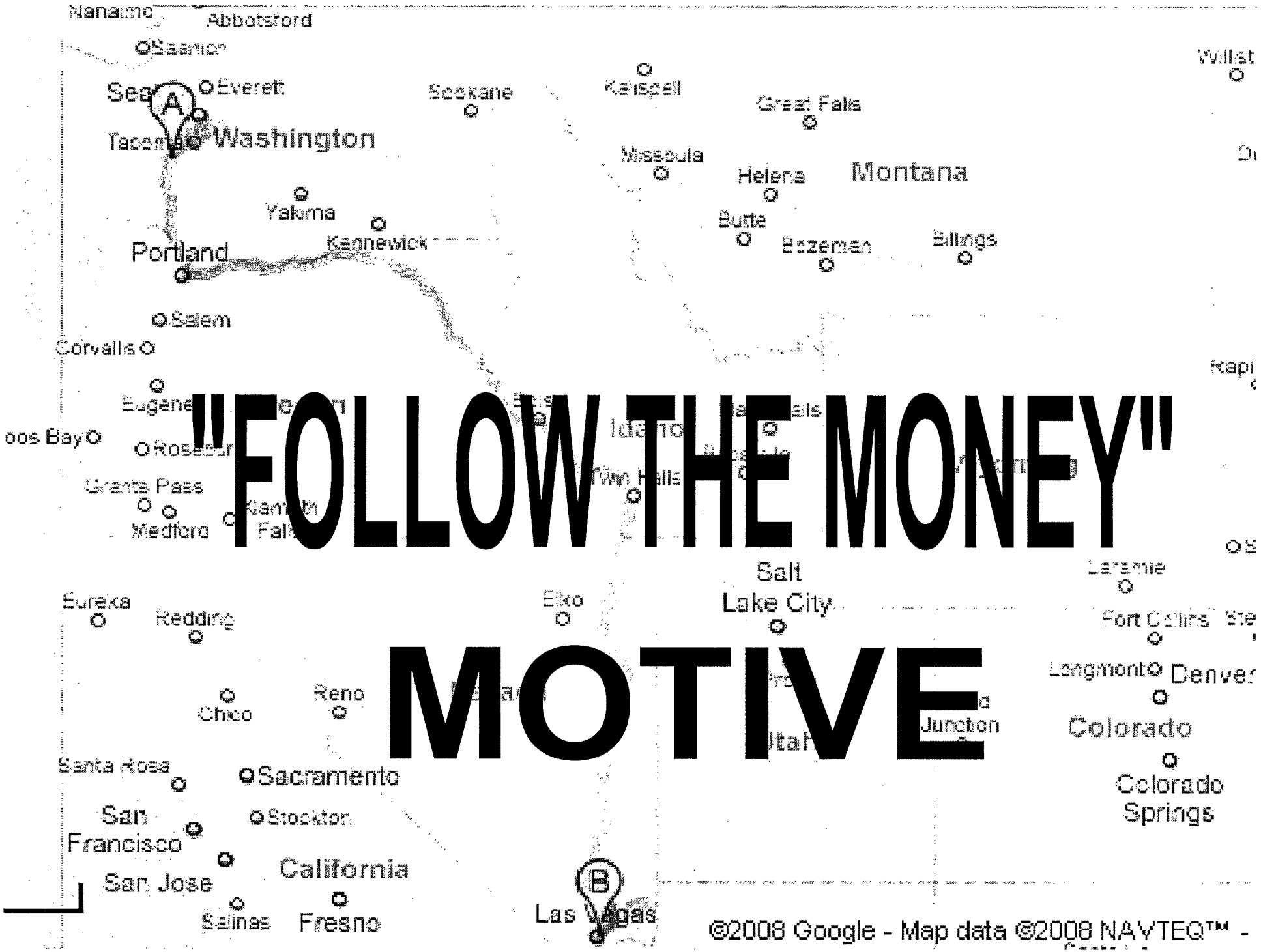


MURDER IN THE FIRST DEGREE

PREMEDITATED MURDER

OR

FELONY MURDER



"FOLLOW THE MONEY"

MOTIVE


4TH AVE
320 "I" St. Sn
"I" STREET
2ND AVE
320 "I" STREE
SITE PLAN
SCALE: 1" = 40

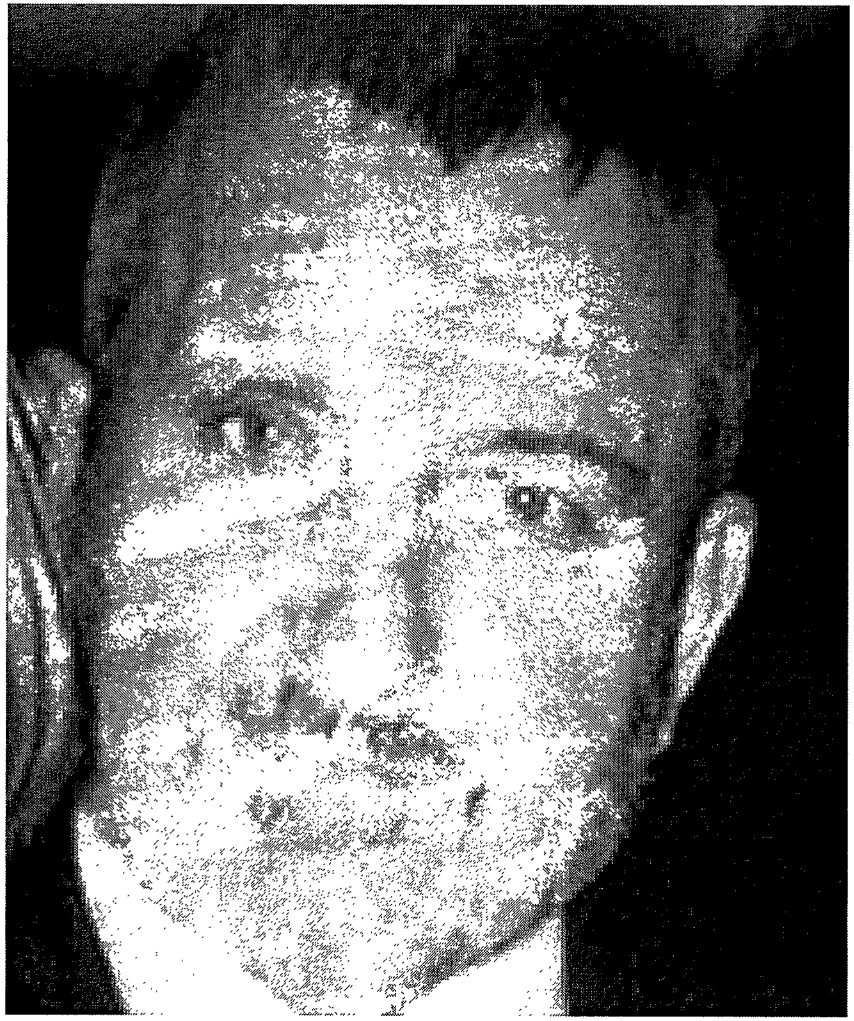
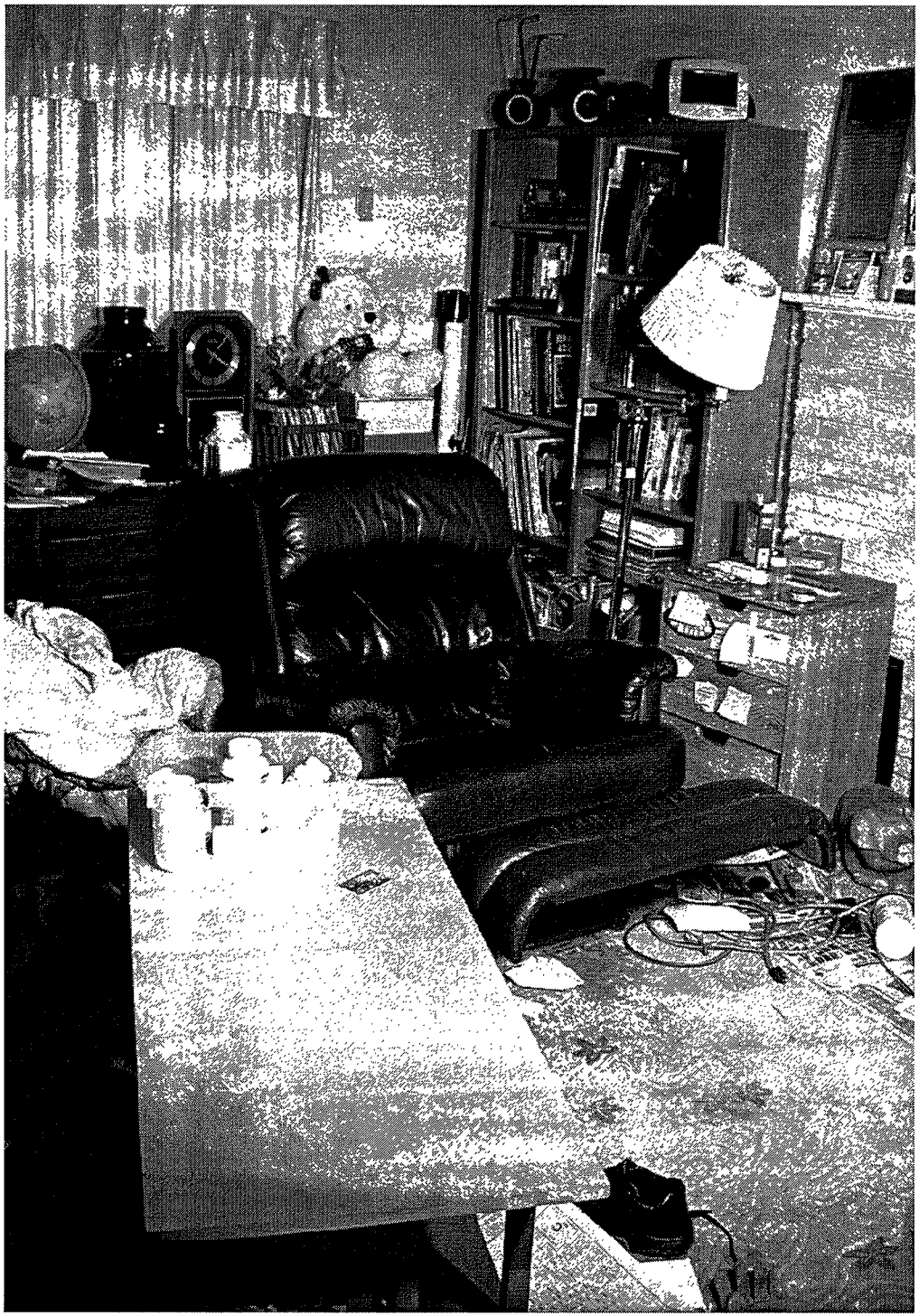


EXHIBIT 14

EXHIBIT 27



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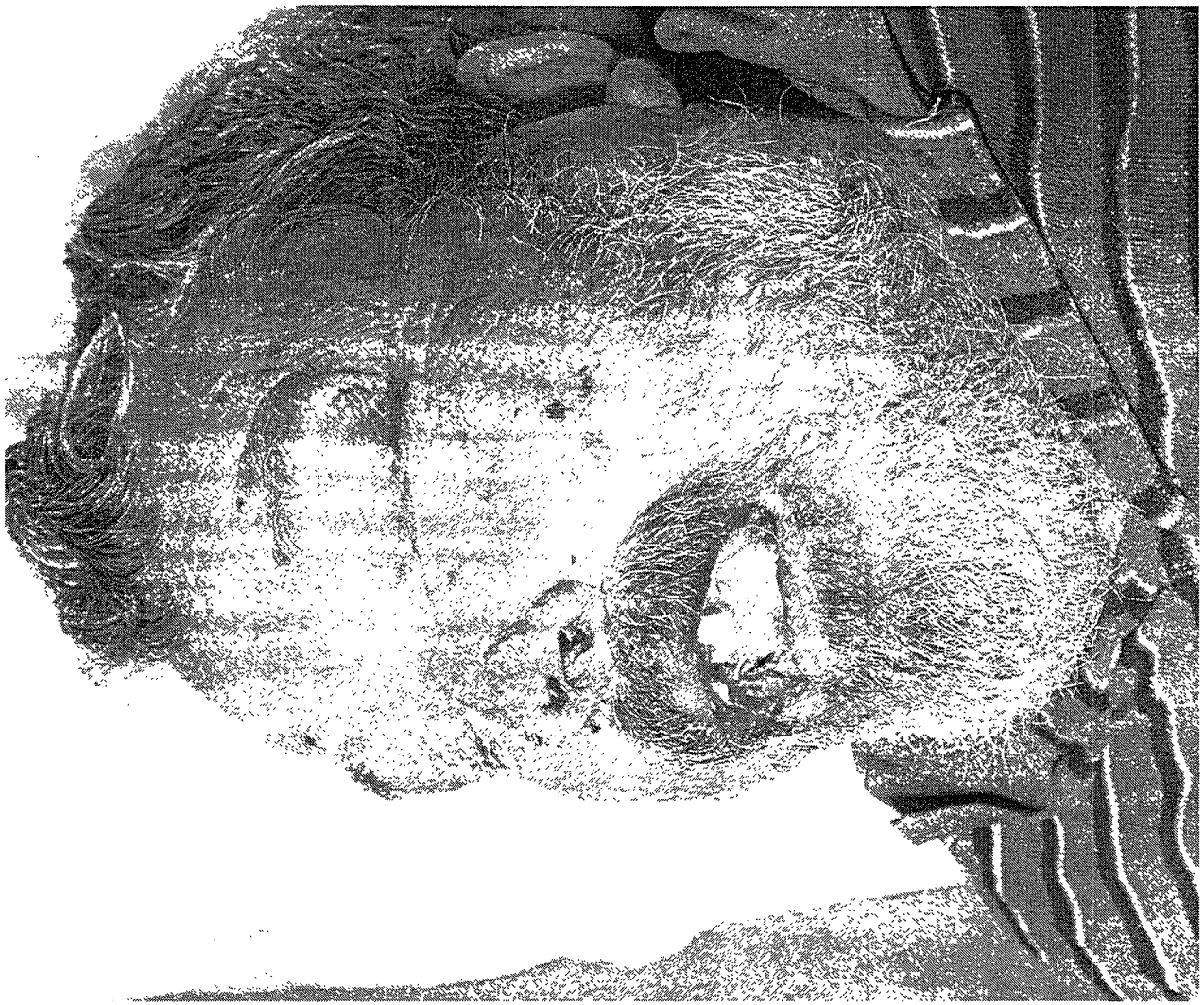
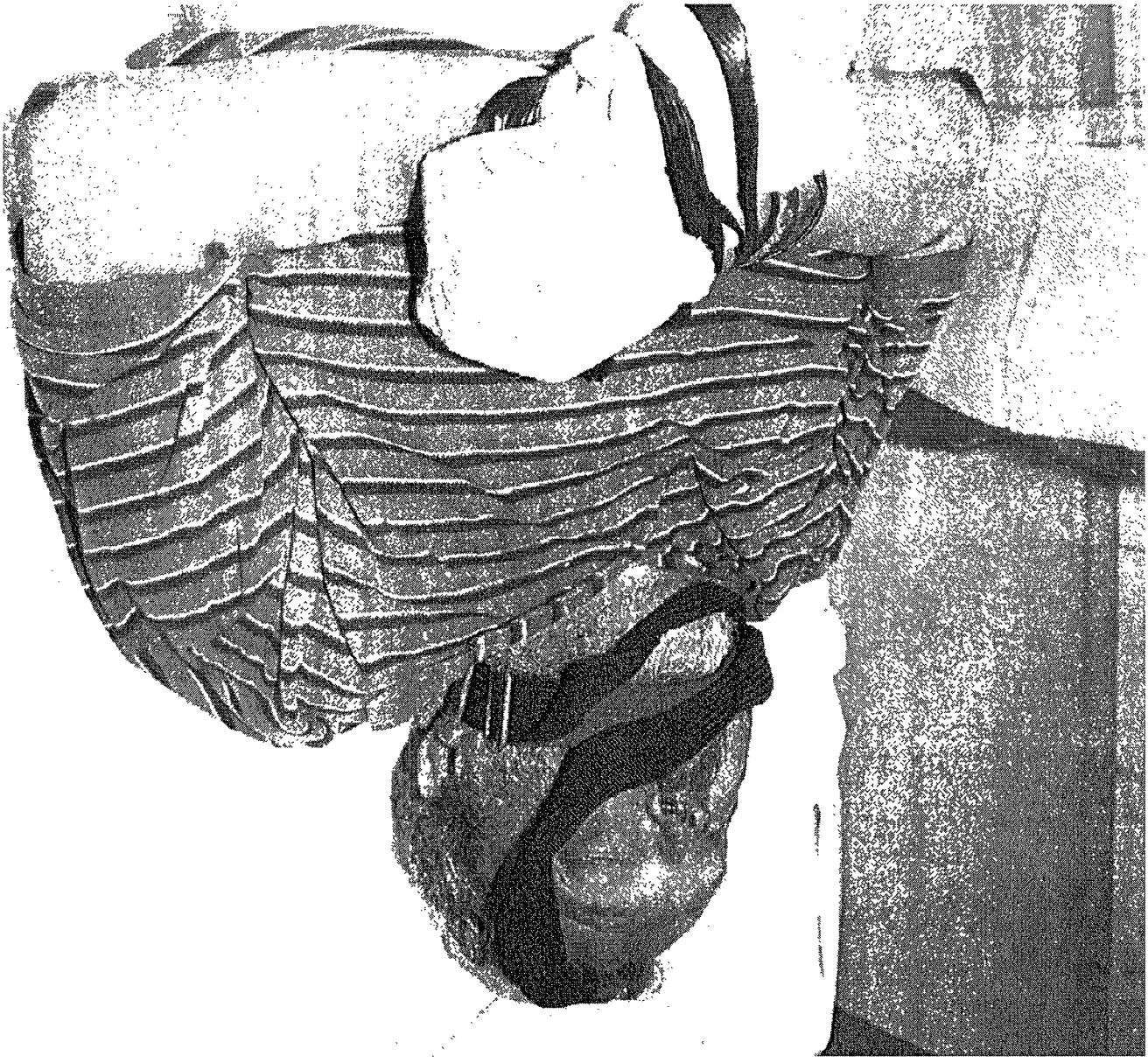
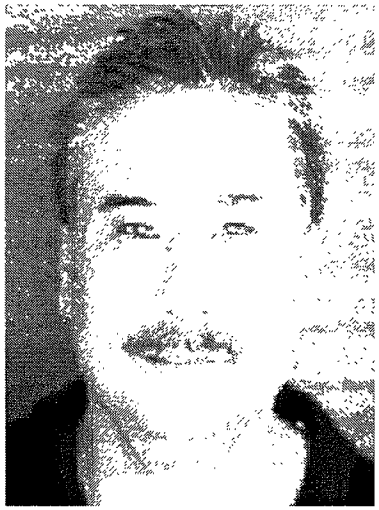


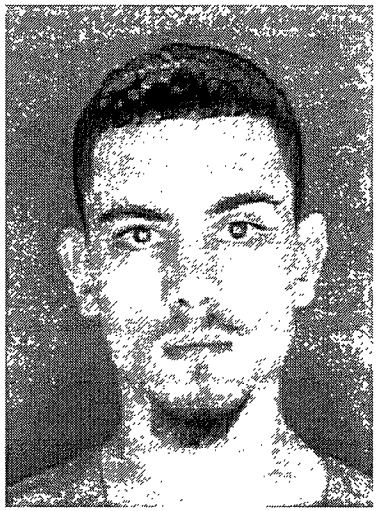


STATE OF WASHINGTON

vs.

MICHAEL SUBLETT AND CHRISTOPHER OLSEN





MURDER IN THE FIRST DEGREE

PREMEDITATED MURDER

OR

FELONY MURDER

"MURDER IN THE FIRST DEGREE"

2 methods of committing same crime:

- Killing with premeditated intent "Premeditated"
- Killing in course of Burglary in the First Degree or Robbery in the First or Second Degree = "Felony Murder"

BURGLARY IN THE FIRST DEGREE

Entering or remaining unlawfully in a building with intent to commit a crime against a person or property therein, and if, in entering or while in the building or in immediate flight therefrom, that person or an accomplice in the crime is armed with a deadly weapon ***or*** assaults any person.

ROBBERY IN THE SECOND DEGREE

He or she unlawfully and with intent to commit theft thereof takes personal property from the person or in the presence of another against that person's will by the use or threatened use of immediate force, violence, or fear of injury to that person or to that person's property. The force or fear must be used to obtain or retain possession of the property or to prevent or overcome resistance to the taking, in either of which cases the degree of force is immaterial.

ROBBERY IN THE FIRST DEGREE

When in the commission of a robbery or in immediate flight therefrom... is armed with a deadly weapon ***or*** displays what appears to be a firearm ***or*** other deadly weapon ***or*** inflicts bodily injury.

"ACCOMPLICE"

- A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable.
- A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.
- A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:
  - (1) solicits, commands, encourages, or requests another person to commit the crime; or
  - (2) aids or agrees to aid another person in planning or committing the crime.

- The word “aid” means all assistance whether given by words, acts, encouragement, support, or presence.
- A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime.
- However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.
- A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

Each defendant is charged with Murder in the First Degree ALTERNATIVELY

- That evidence proves the defendant committed Premeditated Murder ***OR*** "Felony Murder".
- Only one (alternative) needs to be proved.

ALTERNATIVE A: Murder in the First Degree – (Premeditated)

- (1) That on or about January 29, 2007, the defendant and/or an accomplice caused the death of Jerry Totten;
- (2) That the defendant or an accomplice acted with intent to cause the death of Jerry Totten;
- (3) That the intent to cause the death was premeditated;
- (4) That Jerry Totten died as a result of the defendant's and/or an accomplice's acts; and
- (5) That the acts occurred in the State of Washington.

Premeditated means thought over beforehand. When a person, after any deliberation, forms an intent to take human life, the killing may follow immediately after the formation of the settled purpose and it will still be premeditated. Premeditation must involve more than a moment in point of time. The law requires some time, however long or short, in which a design to kill is deliberately formed.

ALTERNATIVE B: Murder in the First Degree – (Felony Murder)

- (1) That on or about January 29, 2007, Jerry Totten was killed;
- (2) That the defendant was committing or attempting to commit the crime of burglary in the first degree or robbery in the first or second degree;
- (3) That the defendant, or another participant, caused the death of Jerry Totten in the course of or in furtherance of such crime or in immediate flight from such crime;
- (4) That Jerry Totten was not a participant in the crime; and
- (5) That the acts occurred in the State of Washington.

DIRECT AND CIRCUMSTANTIAL EVIDENCE

"DIRECT" -- OBSERVATION THROUGH SENSES

(SEE, HEAR, SMELL)

"CIRCUMSTANTIAL" – "REASONABLE INFERENCES"

- DRAWN FROM "COMMON EXPERIENCES"

"LAW MAKES NO DISTINCTION" BETWEEN THEM

- Evidence may be either direct or circumstantial.
- Direct evidence is that given by a witness who testifies concerning facts that he or she has directly observed or perceived through the senses.
- Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience.
- The law makes no distinction between the weight to be given to either direct or circumstantial evidence.
- One is not necessarily more or less valuable than the other.

CREDIBILITY = BELIEVABILITY OF WITNESSES

- You are the sole judges of the credibility of each witness.
- You are also the sole judges of the value or weight to be given to the testimony of each witness.

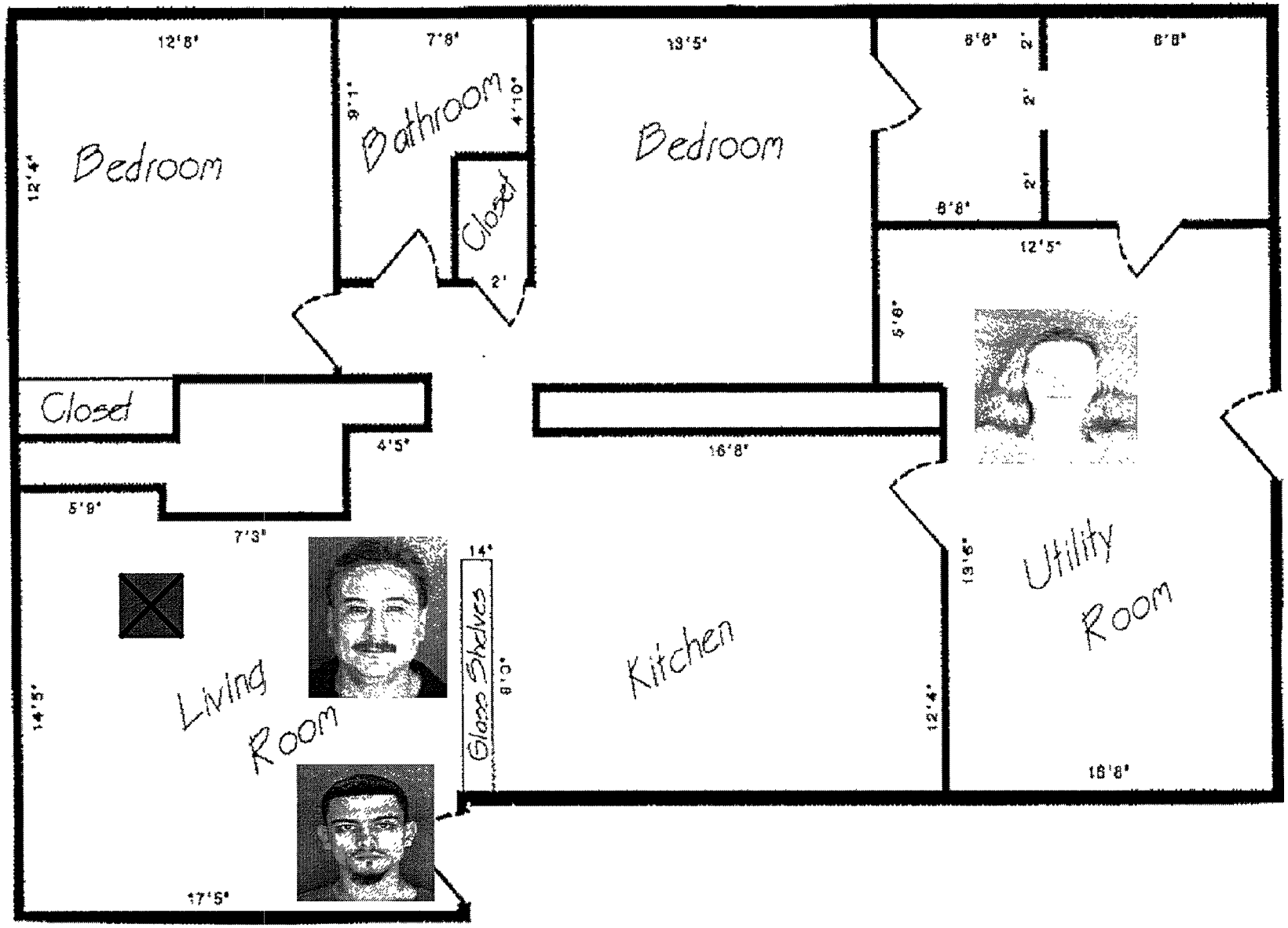
CONSIDER:

- The opportunity of witness to observe or know the things he or she testifies
- The ability of the witness to observe accurately
- The quality of a witness's memory
- The manner of the witness while testifying

CONSIDER:

- Any personal interest that the witness might have in the outcome
- Any bias or prejudice that the witness may have shown
- The reasonableness of the witness's statements in the context of all of the other evidence
- Any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony

The testimony of an accomplice, given on behalf of the plaintiff, should be subjected to careful examination in the light of other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon such testimony alone unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth.


12'8"
7'8"
13'5"
8'8"
2'
6'8"
Bedroom
Bathroom
Closed
Bedroom
12'4"
9'1"
4'10"
2'
2'
2'
8'8"
12'5"
5'6"
Closed
4'5"
16'8"
5'8"
7'3"
14"
Glass Shelves
8'0"
Kitchen
Utility
Room
13'6"
Living
Room
14'5"
12'4"
18'8"
17'5"

January 2007

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
	1	2	3	4	5	6
7	8	9	10 Sublett: at Lacey Rare Coins (Selling)	11	12	13
14	15	16 Sublett: Tumwater Pawn – (V generator)	17	18	19	20
21 Reno	22 Reno	23	24	25 Jerry Totten wallet (credit cards) stolen by Sublett	26	27 Sublett: Pawn Xchange - $200 (Honda generator) J&I
28 Jail Call w/Olsen – "we are hooked up"	29 Olsen/Sublett/Frazier call. Sublett does Western Union Transfer for $2400.00 (w/Visa) Olsen bailed out of jail. **Jerry Totten Murdered**	30 Victim moved. Gatenbein sees PU truck on Old Hwy 99 (6 – 7 PM)	31 Western Union:Transfer $1,300 Little Creek Casino			

February 2007

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
				1 Totten credit card Little Creek Casino	2 Little Creek Casino	3 ATM withdrawl – Tumwater Key Bank Guest House Suite (Tumwater)
4 Frazier contacts Elsie Pray-Hicks	5 Suburban borrowed	6 Puyallup ATM withdrawl	7 Western Union - $1,000 Double Tree (Portland) ATM	8 ATM withdrawal- Portland, OR Key Bank Wild Horse Resort (Pendlelton, OR)	9 ATM withdrawal- Pendleton, OR Key Bank	10 TWPD Welfare check Totten body discovered ATM withdrawal- Pendleton, OR
11	12 ATM withdrawal Boise, Idaho	13 Sublett and Frazier arrested in Vegas	14 Sublett & Frazier property inventory (Det. Tabor)	15	16 Lt. Brenna searches for Olsen. Olsen says contact on 18th	17
18 No contact	19	20	21	22 Olsen found. "Chris Deshawn" False I.D. Interviewed	23	24
25	26	27	28			


BELL
PEPPERS
X LARGE
LARGE
MEDIUM
SMALL
BRAND
TOMATOES
EXHIBIT 36

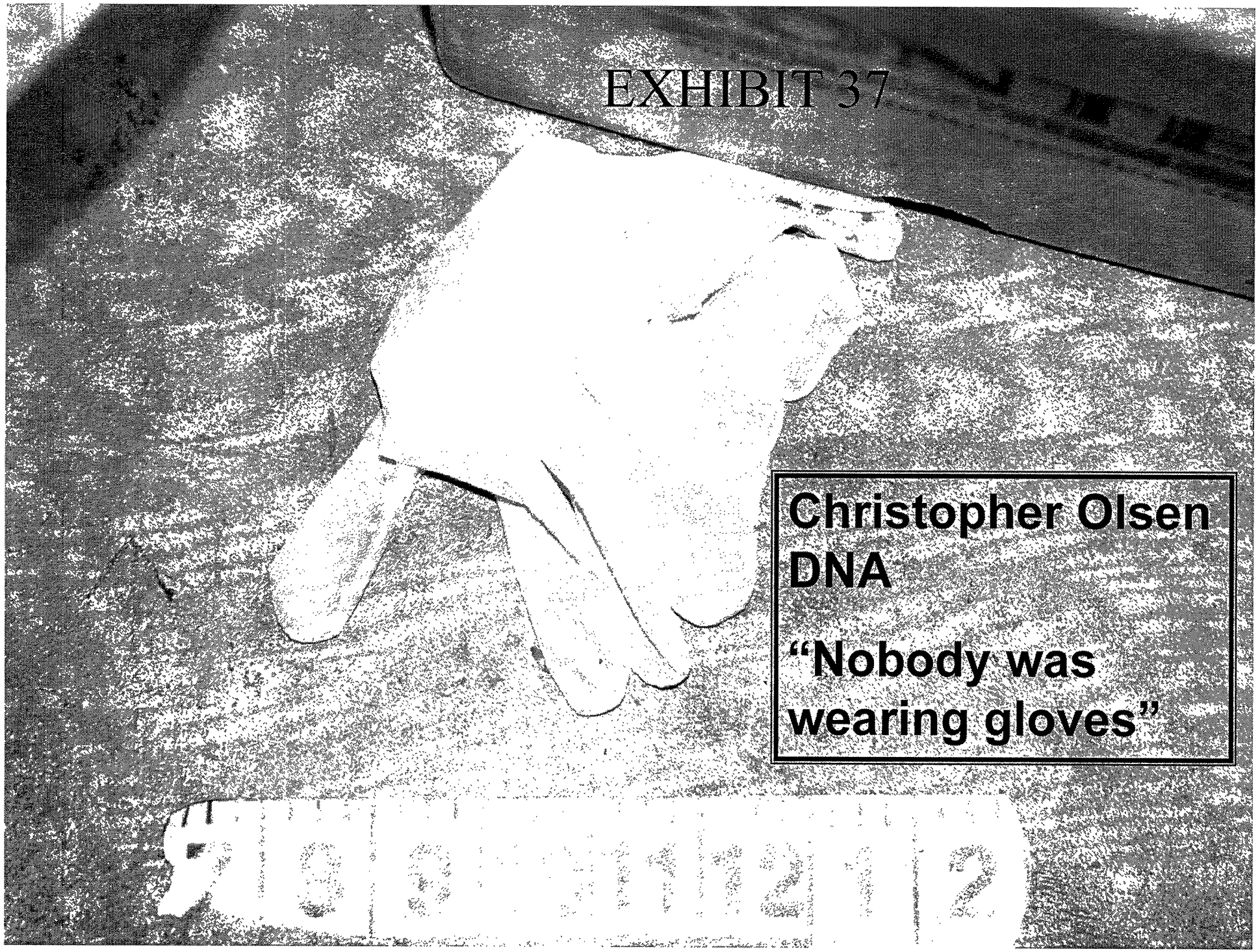


EXHIBIT 37
Christopher Olsen
DNA
"Nobody was
wearing gloves"

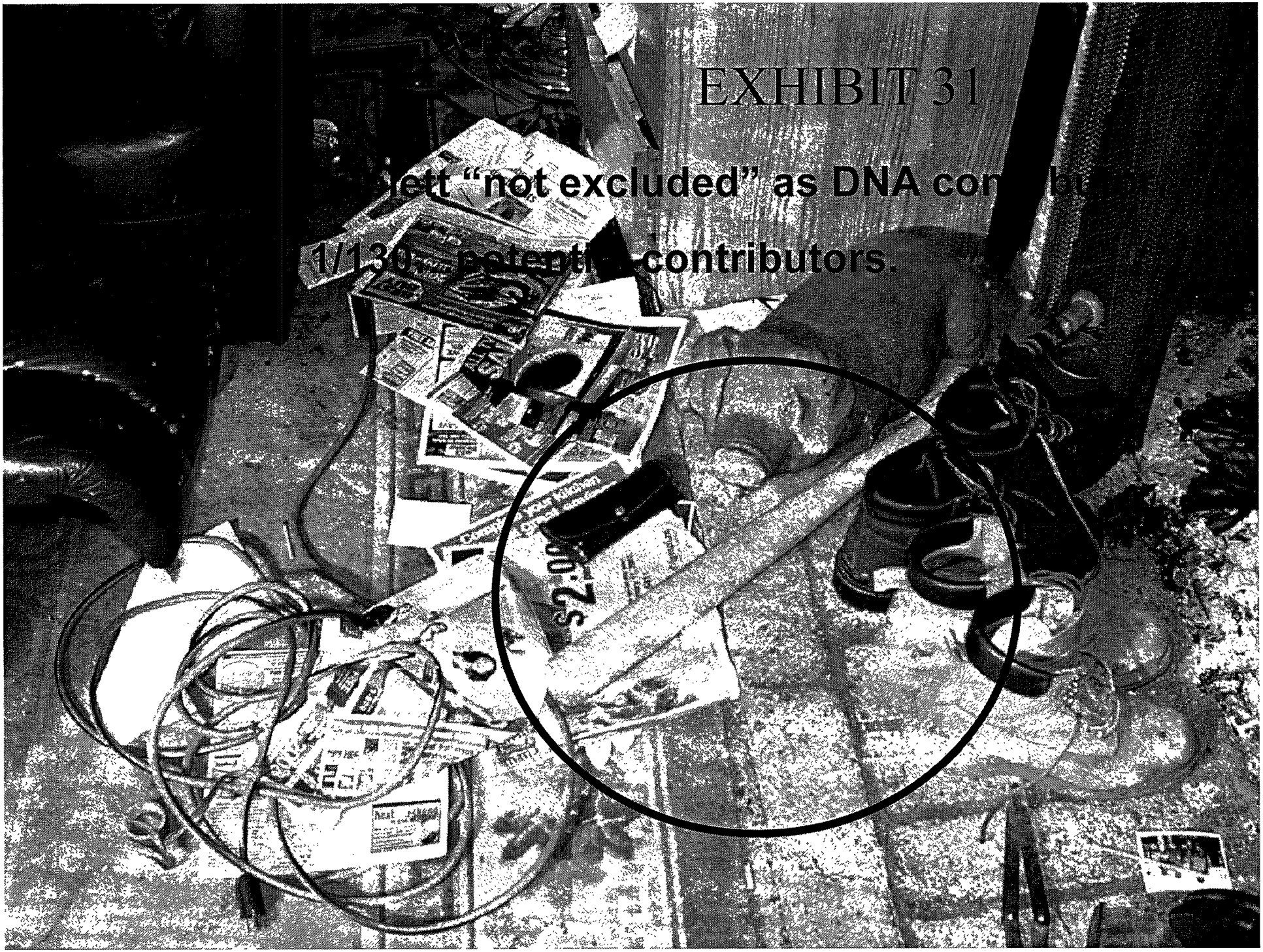


EXHIBIT 31
1/130 potential contributors.

JAIL CALLS: (Christopher Olsen speaks)

"… we are hooked up…"

"… soon as I get out…"

"… how much do we need to make?..."

"… I mean, because I got a spot I can close up at…"

"… Exactly. That's what I'm saying. That, that's the plan, I mean…"

"… well how much money do we need to make?..."

"… well, then let's get to the grind…"

"… Yeah. All we gotta do is get me outta here…"

"… Exactly. I mean, if you tell me to do it, it obviously needs to be done, Sis, so I'm gonna handle it…"

"… Baby girl, check this out. I'm like the terminator, okay? The only thing I need is a little bit of oil and water, I'll be alright..."

Christopher Olsen interviews

- 3+ weeks after crime
- 5+ weeks after crime
- made AFTER his capture

Inconsistencies

"construction work"	none
Claimed fear	Never left when opportunity arises
Wanted to "call cops"	Avoided police
"nobody wearing gloves"	He WAS
"I wanted out"	He STAYED
"poor me"	"I'm like the Terminator…

"Any time you mix drugs… and people with major attitudes, it always turns out… bad"

"My mouth… is the only thing that can save my ass…"

Michael Sublett to (Elsie Pray):

SUBLETT: "… I'm really thinkin' hard about comin' back and turnin' myself in,..."

ELSIE PRAY: "… You need to turn yourself in…"

SUBLETT: "… Yeah, I know I do. I'm really messed up…"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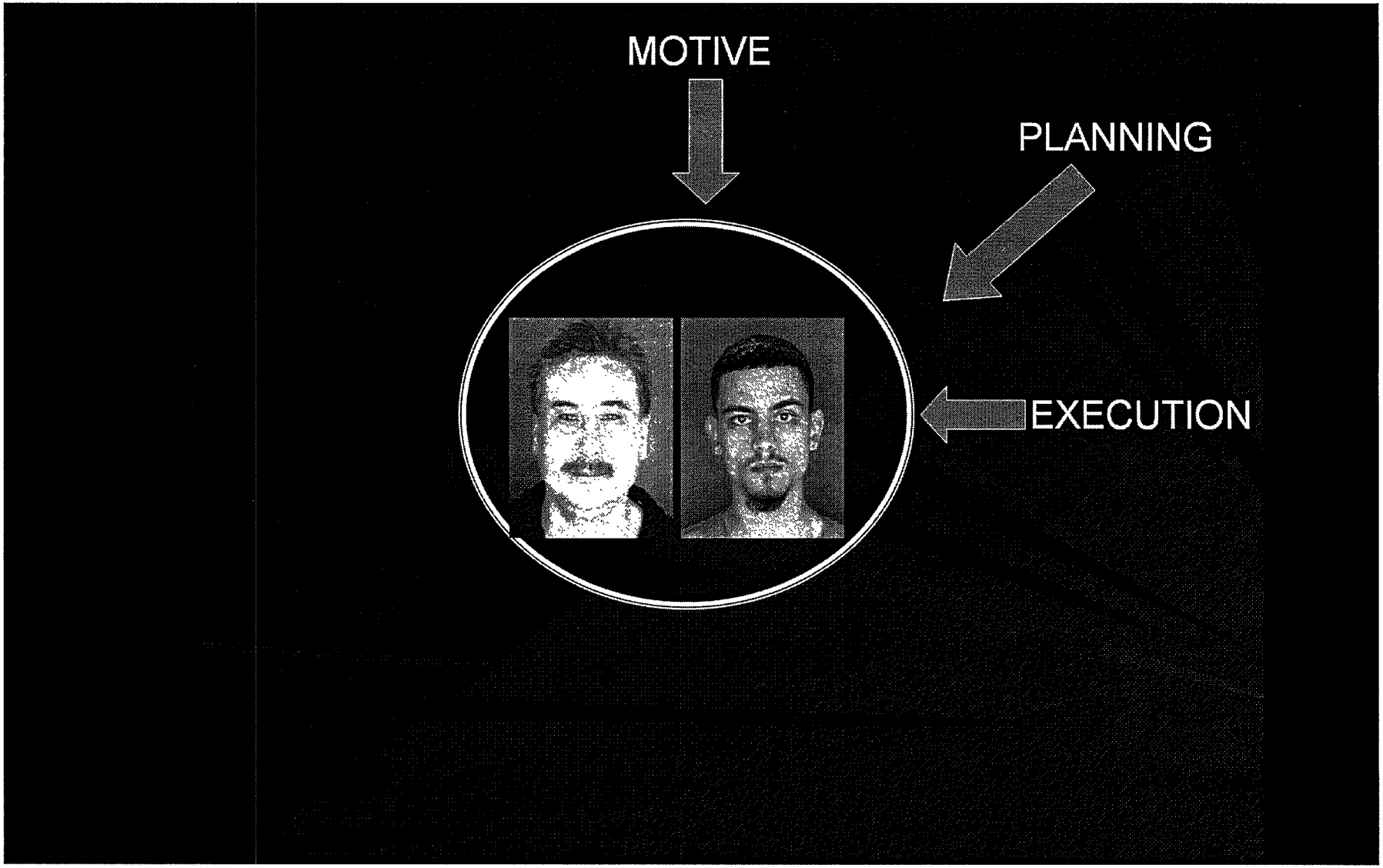
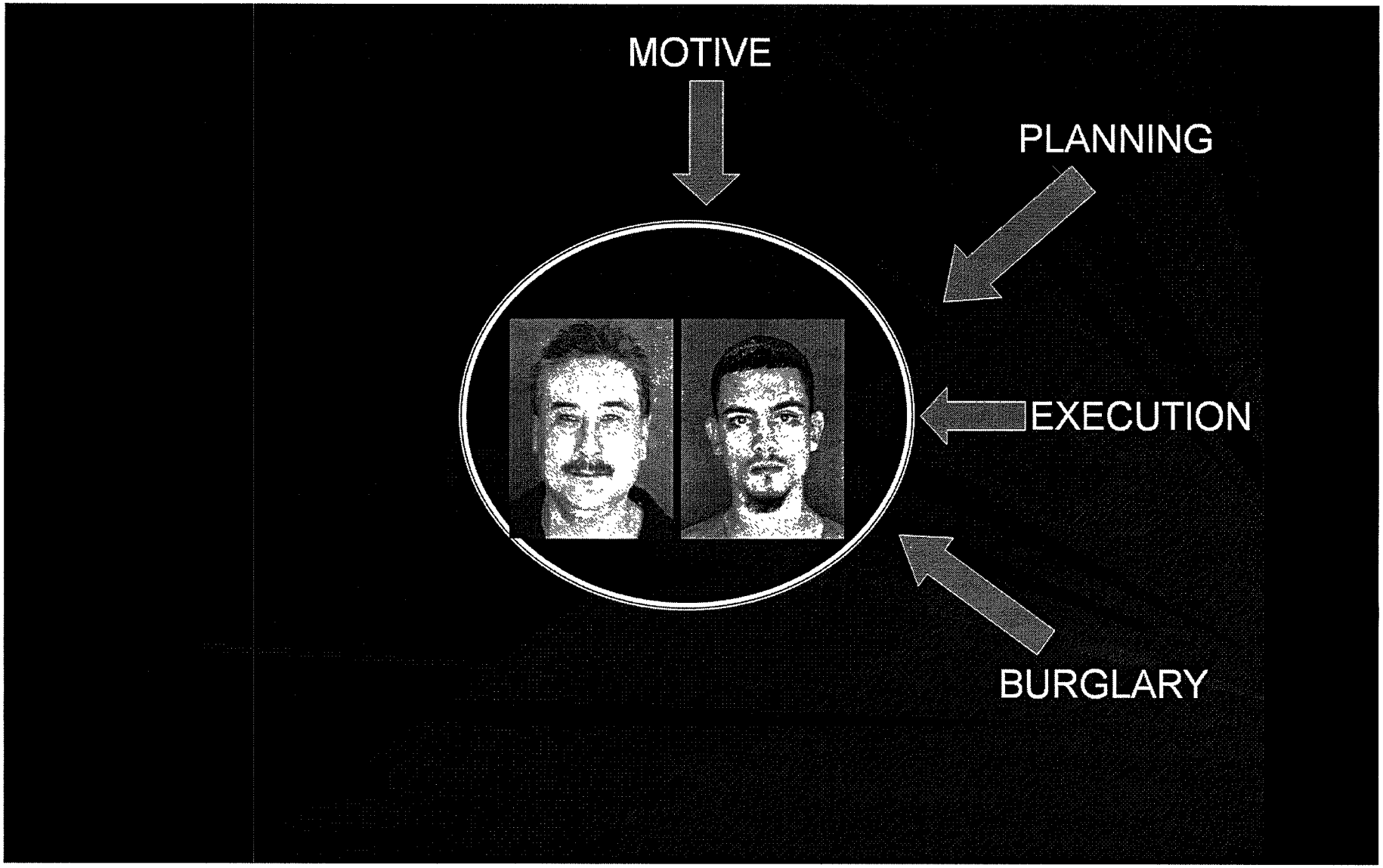
02/12/2007 12:29:36.50

- The defendant has entered a plea of not guilty.
- A defendant is presumed innocent.
- This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
- A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully considering all of the evidence or lack of evidence.
- If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

MOTIVE

MOTIVE
PLANNING


MOTIVE
PLANNING
EXECUTION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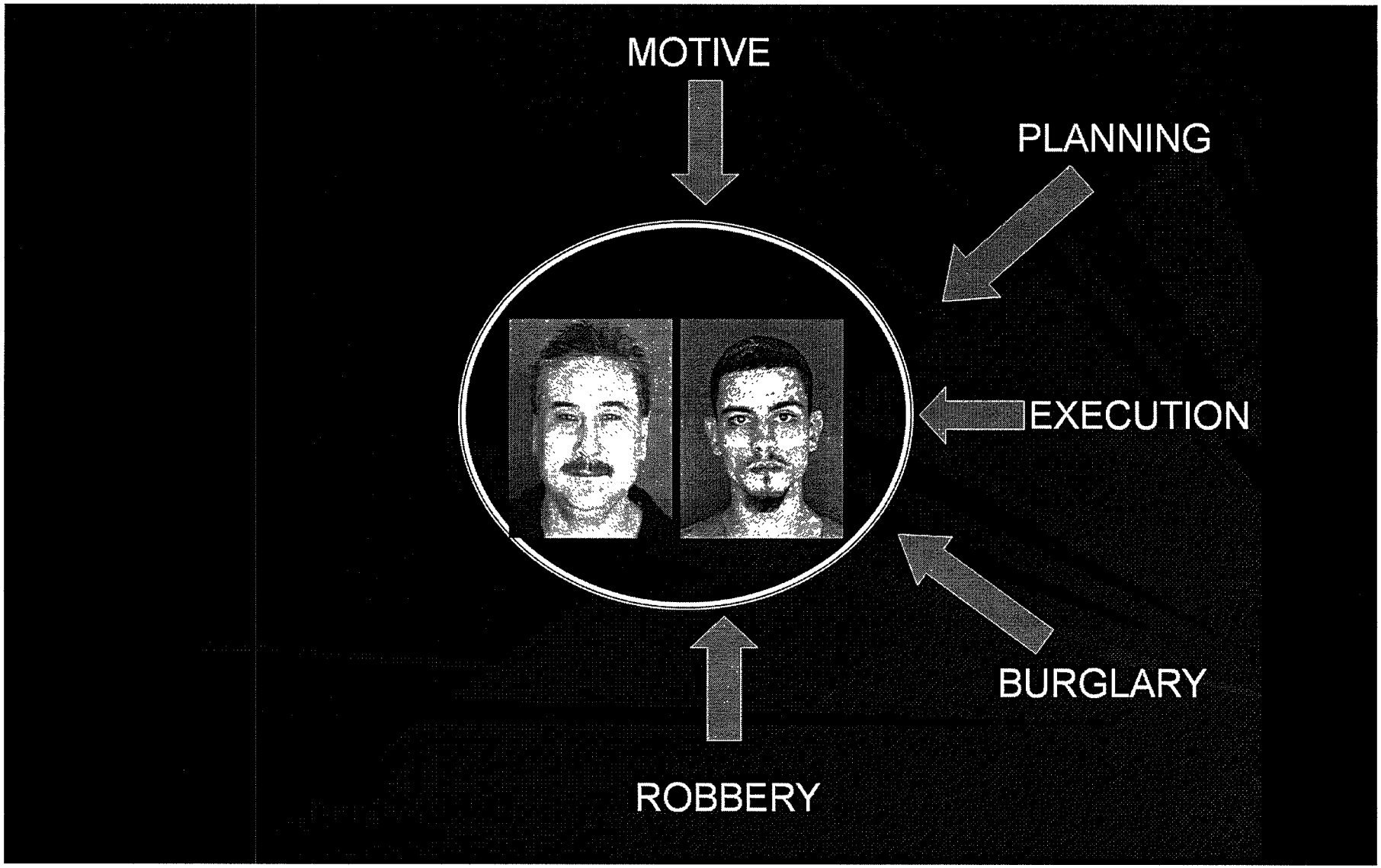
PLANNING
EXECUTION
BURGLARY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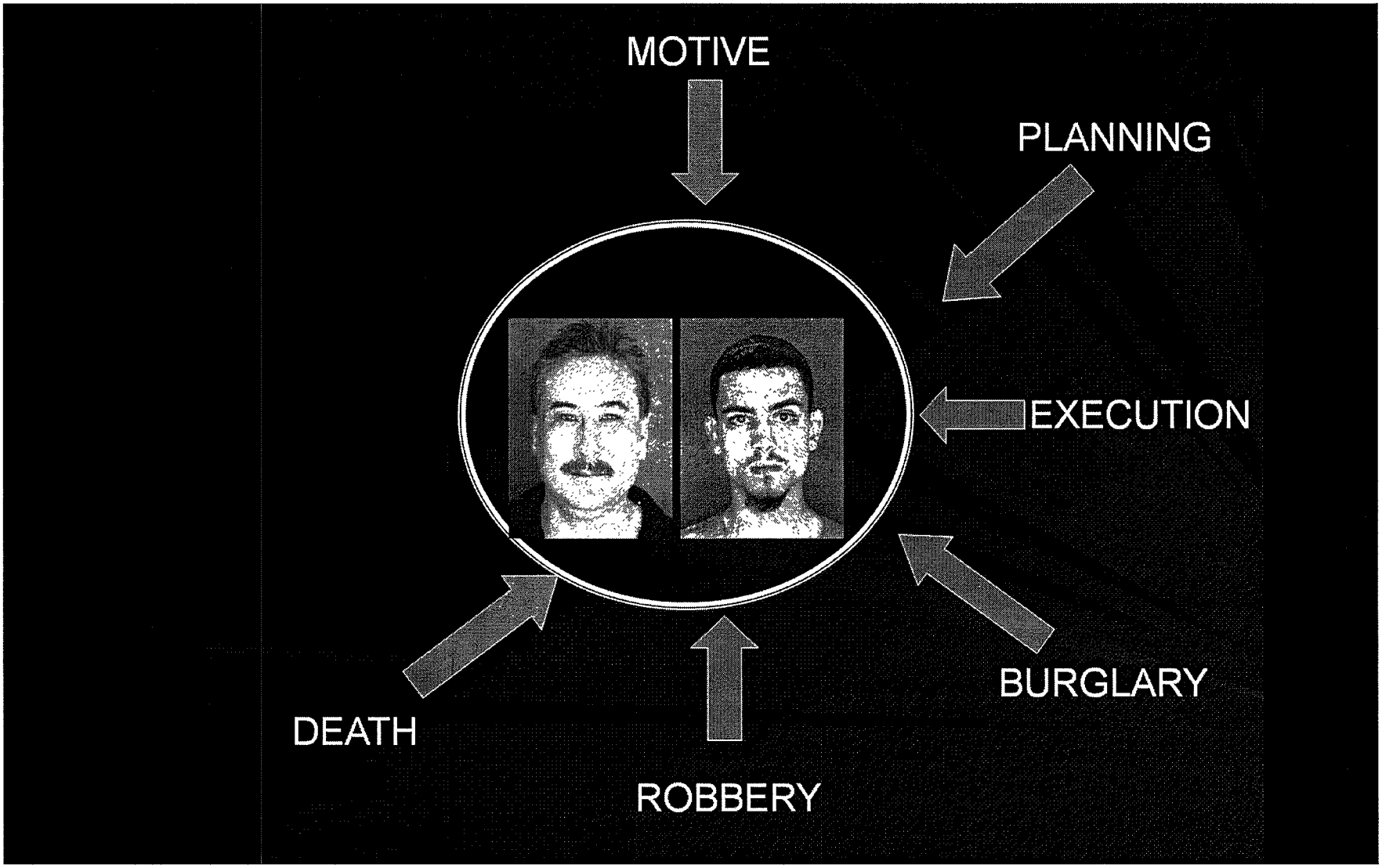
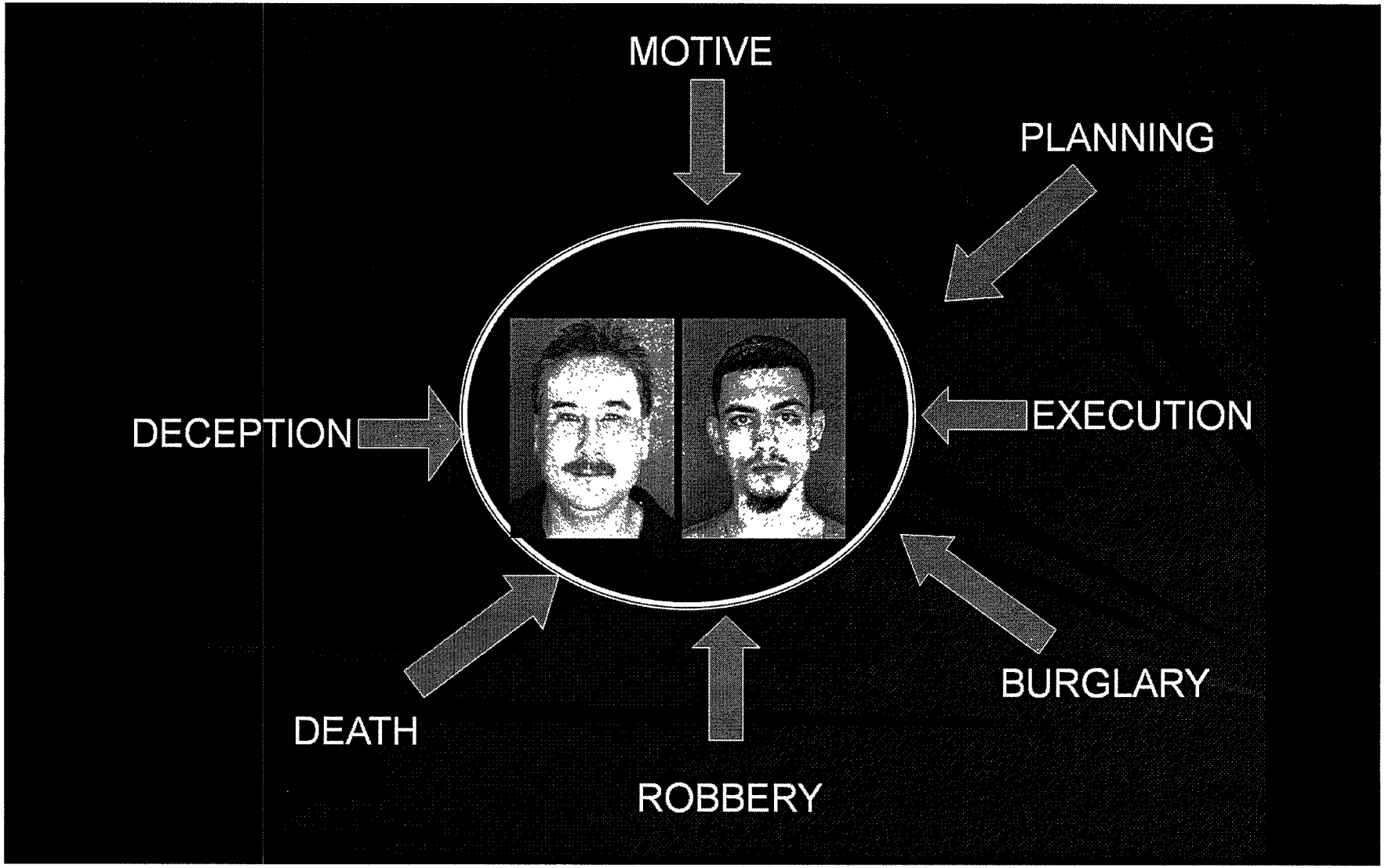
BURGLARY
ROBBERY


MOTIVE
PLANNING
EXECUTION
BURGLARY
ROBBERY
DEATH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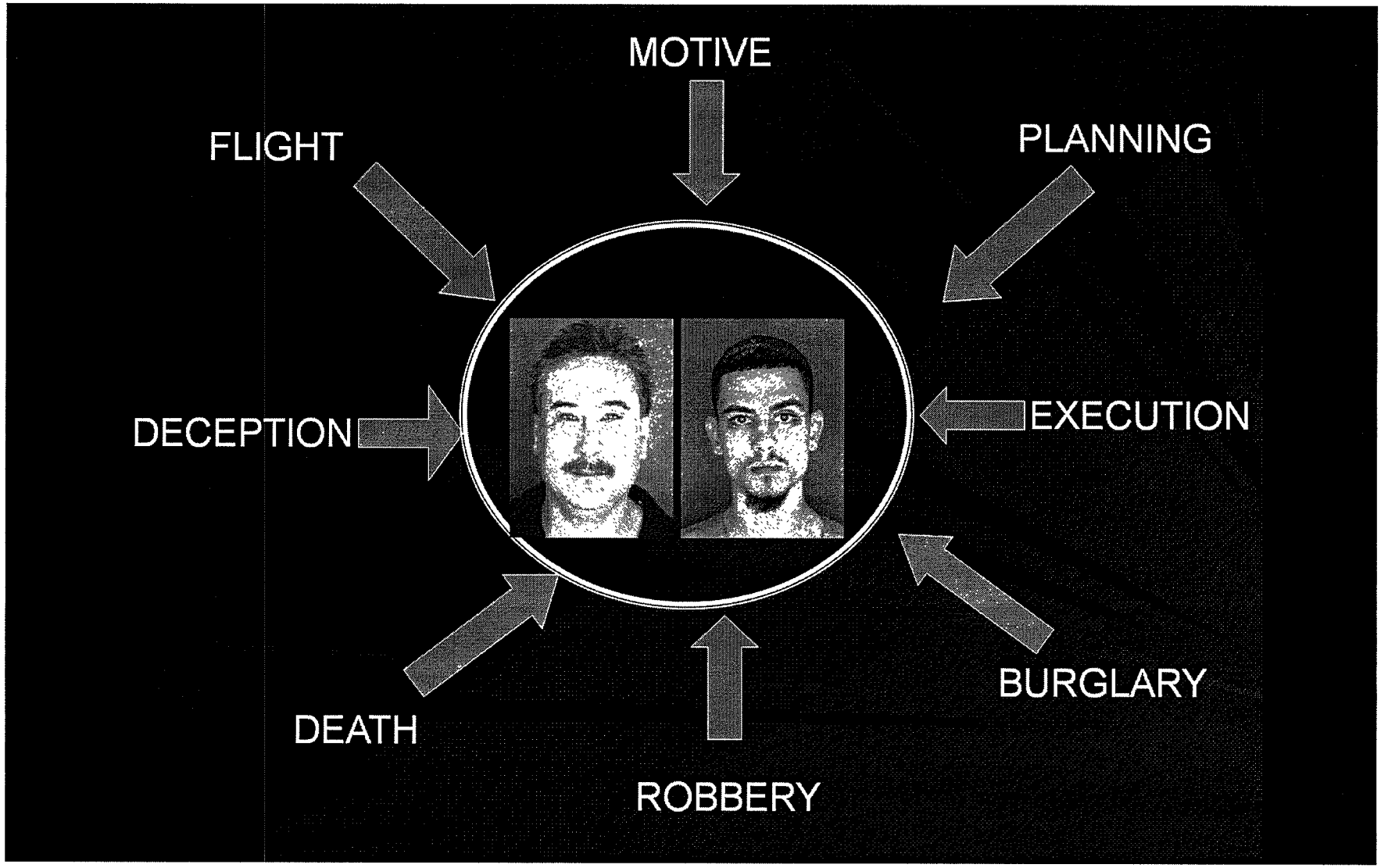
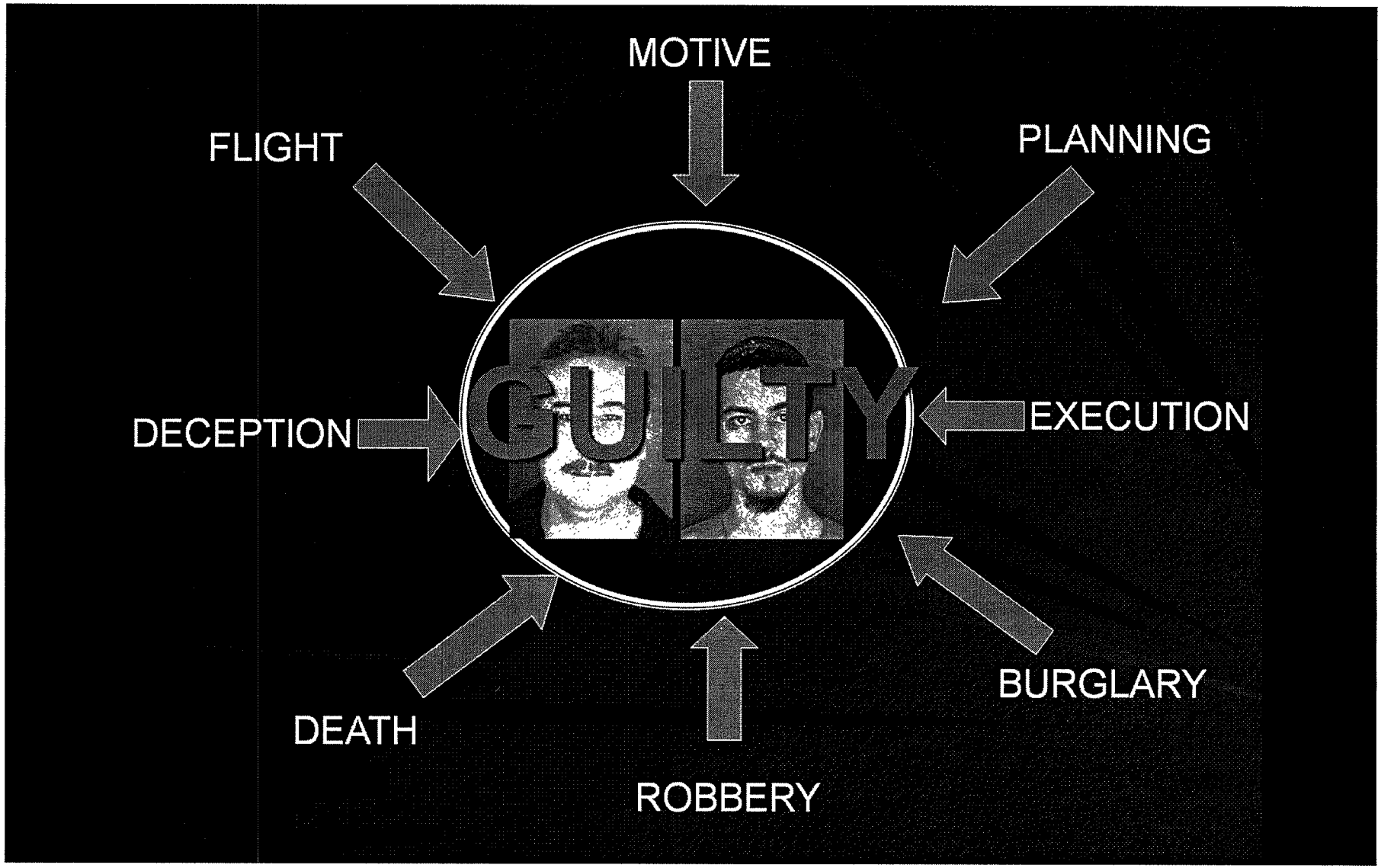
PLANNING
DECEPTION
EXECUTION
DEATH
BURGLARY
ROBBERY


MOTIVE
FLIGHT
PLANNING
DECEPTION
EXECUTION
DEATH
BURGLARY
ROBBERY


MOTIVE
FLIGHT
PLANNING
GUILTY
DECEPTION
EXECUTION
DEATH
BURGLARY
ROBBERY

APPENDIX C

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II
NO. 44984-6-II

IN RE THE PERSONAL RESTRAINT PETITION OF	DECLARATION OF CAROL LA VERNE
CHRISTOPHER OLSEN	Thurston County Superior Court NO. 07-1-01363-0

DECLARATION

STATE OF WASHINGTON)
) ss.
COUNTY OF THURSTON)

I, Carol La Verne, do solemnly swear and affirm that the following is true and correct:

I am a Deputy Prosecuting Attorney with the Thurston County Prosecutor's Office. As part of my duties I have reviewed the PowerPoint presentation that was used in the trial of Christopher Olsen, Thurston County Superior Court cause number 07-1-01363-0. It has been kept electronically in this office since the trial.

The copies of the PowerPoint slides contained in Appendix B to this response to Olsen's Personal Restraint Petition are true and accurate copies of the PowerPoint slides prepared by the deputy prosecutor for use during the State's closing argument at the petitioner's trial, except that the originals are in color and the copies in Appendix B are black and white. I have no knowledge as to whether all of them were shown to the jury or not.

I do solemnly swear and affirm, under the penalty of perjury under the laws of the State of Washington, that the above is true and correct.

Signed this 20th day of August, 2013, in Olympia, Washington.

Carol La Verne, WSBA #19229
Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

I certify that I served a copy of the State's Response to Personal Restraint Petition, on all parties or their counsel of record on the date below as follows:

Electronically transmitted:

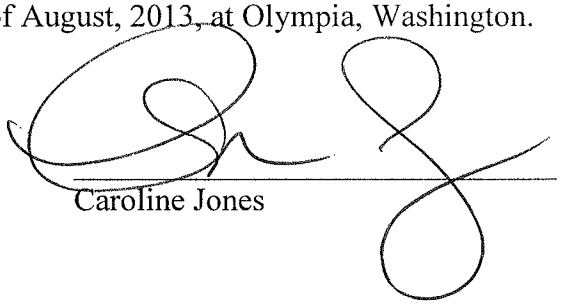
TO: DAVID C. PONZOHA, CLERK
COURTS OF APPEALS DIVISION II
950 BROADWAY, SUITE 300
TACOMA, WA 98402-4454

--AND--

MAILED TO CHRISTOPHER OLSEN, #831898
WASHINGTON STATE PENT.
1313 N. 13TH ST
WALLA WALLA, WA 99362

I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 20 day of August, 2013, at Olympia, Washington.



Caroline Jones

THURSTON COUNTY PROSECUTOR

August 20, 2013 - 2:49 PM

Transmittal Letter

Document Uploaded: prp2-449846-Response Brief.pdf

Case Name:

Court of Appeals Case Number: 44984-6

Is this a Personal Restraint Petition? ■ Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Response__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Caroline Jones - Email: **jonescm@co.thurston.wa.us**